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In The Supreme Court of the United States

JANUARY TERM, 1977

NO. 76-1160

ALLIED MILLS, INC.,
Petitioner

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND APPENDICES

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INDEX

Page

TABLE OF CASES AND OTHER AUTHORITIES .. ii

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

A. The remedy not only imposes acceptance of the union proposals, but also requires that the employer abandon its right to bargain and its bargaining positions and goals. This is in direct conflict with the legislative history of the Labor Management Relations Act. This case raises vital questions respecting Section 8(d) and Section 10 which have heretofore not been, but should be, decided. Moreover, the circuit courts are split on the reinstatement and backpay aspects of this remedy 8

B. This case raises vital new issues with respect to the application of Section 8(a)(5) by the Board and its use of inference upon inference to reach conclusions. It also presents an apparent conflict in the circuits respecting the National Labor Relations Board's use of inferences and its categorization of employer bargaining positions as being in bad faith in and of themselves 15

CONCLUSION 21

Appendix A — Charge and Complaint 1a

Appendix B — Decision of ALJ and Notices 11a

Page

Appendix C — Decision of Board 49a

Appendix D — Decisions of Court and Letter Clarifying the Date of Final Judgment 51a

Appendix E — Statutes Involved 59a

TABLE OF CITATIONS

Cases:

Chicago, Milwaukee & St. Paul Ry. v. Coogan, 271 U.S. 472 (1925) 20

Cooper Thermometer Company v. N.L.R.B., 376 F.2d 684 (C.A. 2, 1967) 13, 14

Fibreboard Paper Products Co. v. N.L.R.B., 379 U.S. 203, 216 (1964) 9

Fraser & Johnston Company v. N.L.R.B., 469 F.2d 1259 (C.A. 9, 1972) 13, 14

Howard v. U.S., 389 F.2d 287, 291 (C.A. D.C., 1967) 20

Local 57, International Ladies' Garment Workers Union (The Garwin Corp.) v. N.L.R.B., 374 F.2d 295, 300 (C.A. D.C., 1967), *Cert. Den.* 387 U.S. 942 (1967) 15

N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 404 (1952) 18

N.L.R.B. v. Die Supply Co., 393 F.2d 462 (C.A. 1, 1968) 14

N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221 (1963) 17

N.L.R.B. v. Gissel Packing Company et al., 395 U.S. 575, 610-616, *Reh. Den.* 396 U.S. 369 (1969) 9

Page

N.L.R.B. v. Insurance Agent's International Union, 361 U.S. 477, 487 (1960) 19

N.L.R.B. v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 29 (C.A. 9, 1968) 6, 17, 18

N.L.R.B. v. Reed & Prince Mfg. Co., 205 F.2d 131 (C.A. 1, 1953) 16, 17

Oddie v. Ross Gear & Tool Co., Inc., 305 F.2d 143, 149 (C.A. 6, 1962), *Cert. Den.* 371 U.S. 941 (1962) 15

Omaha Typographical Union No. 190 v. N.L.R.B., 220 NLRB No. 161 (Oct., 1975) *affirmed* ___ F.2d ___ (C.A. 8, 1976) Case No. 75-1833 .17, 20

Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 188, 194 (1941) 9, 10

H. K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970) 9

U.S. v. Ravich, 421 F.2d 1196, 1204 (C.A. 2, 1970) *cert. den.* 400 U.S. 834 20

United States v. Ross, 92 U.S. 281 (1875) 20

Virginia Electric & Power Co. v. N.L.R.B., 319 U.S. 533, 540 (1943) 9

Statutes:

Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. § 151 *et seq.* (1973)
Section 8(a)(3), 29 U.S.C.A. §158(a)(3) ..3, 10, 11, 12
Section 8(a)(5), 29 U.S.C.A. §158(a)(5) 3, 5, 10, 11, 12, 16
Section 8(d), 29 U.S.C.A. §158(d) 3, 9, 10, 11, 12, 16, 18, 19
Section 10, 29 U.S.C.A. §160 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND APPENDICES

Allied Mills, Inc., Petitioner, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-styled case on December 30, 1976, in which the Court enforced an order of the National Labor Relations Board finding Petitioner liable for discrimination and bad-faith bargaining when Petitioner closed an old plant in Buffalo, New York, and opened a smaller facility over thirty miles away, in Alexander,

New York. It found that Petitioner bargained in bad faith over the question of transfers to the new plant and then refused to transfer employees because of their union affiliation.

OPINIONS BELOW

The decision and order of the National Labor Relations Board was issued June 6, 1975 (Appendix C, *infra*, p. 49a). It adopted the Administrative Law Judge's decision (JD-540-74) verbatim. (Appendix B, *infra*, p. 11a) The decision and judgment of the Circuit Court of Appeals for the District of Columbia upholding the Board's enforcement order is unreported, and final judgment was entered on December 30, 1976. (Appendix D, *infra*, p. 51a).

JURISDICTION

The opinion of the Court of Appeals was filed on October 26, 1976. A timely Petition for Rehearing was filed with the Court on November 30, 1976, and that Petition was subsequently denied on December 30, 1976.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1) Whether a refusal to bargain and discrimination remedy imposed on an employer for its bargaining position regarding the transfer of employees from a closing plant to a new facility thirty miles away can include: (a) forced

acceptance of the union's transfer proposal, (b) reinstatement to the new plant with full backpay and moving expenses, and the displacing of new employees, (c) recognition of the union at the new plant, and (d) application of the old collective bargaining agreement to the new plant without bargaining.

2) May an employer be held in bad faith over the issue of transfers from an obsolete plant to a new electronic facility, because it took the following bargaining positions: (a) it wanted to hire new employees from the area of the new location, and did not want a commuter staff of prior employees as the union proposed, and (b) prior employees could continue employment, as new employees, at the new plant, if qualified, but there would be no transfers under the union proposal.

STATUTES INVOLVED

This case involves the interpretation, interrelationship and application of Sections 8(a)(3), 8(d), 8(a)(5) and 10 of the Labor Management Relations Act of 1947, as amended. (Respectively, 29 U.S.C.A. §158(a)(3), §158(d), §158(a)(5) and §160) The texts of these are set forth in Appendix E, *infra*, p. 59a.

STATEMENT OF THE CASE

This case arises out of Petitioner's 1973[1] conduct surrounding the closing of an obsolete grain mill in Buf-

[1] All dates are 1973, unless otherwise indicated.

falo, New York, and its correspondent opening of a new, highly mechanized, mill in Alexander, New York, thirty miles away.[2]

The union and Petitioner[3] bargained about the effects of both the closure and opening during 1973.[4] The union demanded that the new plant be staffed by transferring Buffalo employees, with full seniority and benefits.[5] The employer refused this proposal, counter-offering that it would continue the employment of qualified Buffalo employees, only as new hires. The employer insisted on the right to hire new employees for Alexander, and rejected the idea of transferring a commuter staff. However, some Buffalo employees could go to Alexander if they were qualified and willing to start as new hires. In short, the employer would hire Buffalo employees like anyone else, but it refused to "transfer" them under the union proposal; i.e., with full seniority rights and bound by a now-obsolete collective bargaining contract.

These positions remained unchanged throughout the

[2]The old mill employed nearly fifty. The new plant employs twenty to twenty-five. (Appendix B, p. 16a, n. 6)

[3]The parties had peacefully bargained and reached agreement without incident for thirty years prior to this charge. (Appendix B, p. 13a)

[4]There were three formal sessions prior to Buffalo's closing on December, 1973; respectively, in July, October and November. (Appendix B, p. 14a)

[5]The union also demanded recognition, and the application of the Buffalo contract to Alexander.

bargaining on both sides.[6] The employer offered a means for continued employment, but denied full transfer privileges. The union insisted on transfers with full benefits. After the last session in November, 1973, the employer began hiring for the new plant. Not one Buffalo employee applied, though the offer was extended and remains open.

Many non-bargaining unit employees, management and clerical, were offered jobs at the new plant.[7] Most refused, declining to commute the thirty miles twice a day.

The union filed discrimination and refusal-to-bargain charges based on the employer's position respecting transfers. (Appendix A, p. 2a)

The decision recited that the employer's position on transfers was unreasonable, and demonstrative of a desire to use the move[8] to "rid itself" of the union. It recites

[6]The decision faulted the employer for not changing its position. The union position was not faulted despite admissions by union representatives that the union considered acceptable nothing less than full recognition, transfers and application of the contract to Alexander.

[7]The decision found it significant and evidence of bad faith that some non-unit employees were offered transfers, but the unit people were not. The employer argued that the Board was comparing incomparable groups to find discrimination. It explained that the non-unit jobs would basically remain the same, while the unit work would undergo significant changes. While the decision recognized that the work would change, the Board nevertheless faulted the employee's explanation based upon its unproven assumption that unidentified employees could have learned to perform the work at Alexander.

[8]That the closure and opening were economically justified, was not at issue and was unquestioned

both 8(a)(5) and 8(a)(3) violations based on inferences made from an evaluation of the employer's bargaining position and explanations for not transferring employees.[9]

The decision was based on a matrix of primary and subsidiary findings[10] of bad faith which were:

(a) The employer never changed its position,

(b) The obligation to bargain over transfers could never be fulfilled by merely offering to continue employment as "new hires",

(c) The employer's insistence on hiring from the labor market at the new plant "effectively precluded" the union from participation in bargaining, and

(d) The employer offered jobs to clerics and supervisors, but not to unit employees.

Based on these findings, the National Labor Relations Board imposed a remedial sanction that includes:

(a) Reinstatement to the new facility for those who signed a union transfer list, with full backpay from the closure date of Buffalo under the terms of the union proposal, and displacing the new hires at Alexander,

(b) Placing all other Buffalo employees on a preferred hiring list,

(c) Immediately apply the old contract to the new plant without bargaining,

[9] Appendix B, p. 30a.

[10] These inferential findings were the basis for both the refusal to bargain and discrimination conclusions.

(d) Commence bargaining with the union at the new plant.

The ultimate finding, that the move was used as an opportunity to get rid of the union, was based upon compounded inferences. These inferences were derived from an attack on the employer's bargaining positions and objectives, rather than concrete evidence of bad faith.[11]

The remedy, in effect, forces the employer to abandon its bargaining positions and agree to the demands of the union.

The employer's objective was clearly legitimate. It sought to staff its newer, more technical facility with qualified employees. Mechanistically transferring employees and carrying forward an old contract which would apply outmoded seniority and job rules would have been inconsistent with this objective. Thus, the company said that qualified Buffalo employees were welcome, but as new employees, and that it wanted to hire from the new area. The Court found these positions discriminatory *per se*.

Petitioner submits that its positions and objectives

[11] The Board argued below that the decision rests on fact findings supported by substantial evidence. It was, and is, wrong. Even those findings of so-called anti-union comments during bargaining were by inference from other comments. Indeed, the Administrative Law Judge admitted that the blunt remarks attributed to the employer were probably never made. Nevertheless, the remarks (which the Board refers to as if quotation) were "inferred" and then heavily relied on in subsequent inferences in the decision. (Appendix B, p. 20a n. 11).

did not prevent Buffalo employees from continuing employment, which was the real issue.

The Administrative Law Judge's decision was affirmed without opinion by the National Labor Relations Board[12] and, again, by the District of Columbia Circuit without opinion on enforcement of the National Labor Relations Board.[13]

REASONS FOR GRANTING THE WRIT

A. THE REMEDY NOT ONLY IMPOSES ACCEPTANCE OF THE UNION PROPOSALS, BUT ALSO REQUIRES THAT THE EMPLOYER ABANDON ITS RIGHT TO BARGAIN AND ITS BARGAINING POSITIONS AND GOALS. THIS IS IN DIRECT CONFLICT WITH THE LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT. THIS CASE RAISES VITAL QUESTIONS RESPECTING SECTION 8(d) and SECTION 10 WHICH HAVE HERETOFORE NOT BEEN, BUT SHOULD BE, DECIDED. MOREOVER, THE CIRCUIT COURTS ARE SPLIT ON THE REINSTATEMENT AND BACKPAY ASPECTS OF THIS REMEDY.

1. *The Remedy Effectively Forces Agreement To A Contract And The Abandonment Of Employer Bargaining Positions And Goals.*

[12] Appendix C, p. 49a.

[13] Appendix D, p. 52a.

The remedy, among other things, orders bargaining; however, a brief examination of its terms demonstrates that compliance would leave nothing substantive to bargain for. It compels adoption of a contract. Thus, the National Labor Relations Board has grievously overstepped its authority.

This Court charged the National Labor Relations Board in *Fibreboard Paper Products Co. v. N.L.R.B.*, 379 U.S. 203, 216 (1964), with the task of devising remedies to effectuate the policies of the Act. The principle that the relation of remedy to policy is a matter peculiarly for administrative competence was established in *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 188, 194 (1941). Thus, Board orders will not be disturbed unless it can be shown that the order is an attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943); *N.L.R.B. v. Gissel Packing Company et al.*, 395 U.S. 575, 610-616, *Reh. Den.* 396 U.S. 369 (1969).

Further, Section 8(d) demands that the National Labor Relations Board must fashion a remedy that effectuates, rather than destroys, the purposes of the Act. *Fibreboard Paper, supra*; *H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99 (1970). In *H. K. Porter, id.*, this Court relied heavily on the following quotation by the Senate Committee interpreting the objective of 8(d):

> The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory. 397 U.S. at 104 (citations omitted)

In contrast to this rule, the remedy herein not only demands exact conformance to the union's transfer proposal, but it goes beyond the union's demands and orders moving expenses, full backpay for employees, and application of the old contract to the new plant.

This order and the underlying findings for 8(a)(5) and 8(a)(3) bootstrap, one upon the other, and effectively destroy the employer's right under 8(d) to refuse to agree, and to bargain.

Reinstatement and backpay are traditional remedies for violations of Section 8(a)(3)[14] (discrimination on account of union beliefs). Here, however, the jobs employees are being reinstated to were not then existing but were the objectives of union bargaining demands which the employer had a right to refuse.

Section 8(d) clearly forbids remedies for violations of Section 8(a)(5) (refusal to bargain) which would force an employer to agree to union objectives.

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[14] *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 188, 194 (1941).

Here, the reinstatement and backpay order clearly forces the employer to agree to hire the employees, though the jobs were union bargaining objectives, apparently under the assumption that where the employer's conduct is both in bad faith and discriminatory, a remedy otherwise not allowable for refusal to bargain, is justified. However, this surely cannot be proper where, as here, the only findings supporting both the 8(a)(5) and the 8(a)(3) violations are inferences made primarily from the employer's bargaining positions. Moreover, this 8(a)(3) violation was found through the tests for bad faith (8(a)(5)), not discrimination. Thus, the remedy should not go to correct discrimination as it does.

The N.L.R.B.'s bootstrap reasoning should not be allowed to circumvent 8(d). An order for an 8(a)(3), not allowable for an 8(a)(5), should not be allowed where the 8(a)(3) is based entirely on 8(a)(5) findings and tests, as is the case here.

The rule of this case is that if an employer bargains in bad faith, then his motivation must also be discriminatory. This is a non-sequiter.

The remedy orders the employer to hire prior employees at the new plant with full backpay, moving expenses, displacement of the new employees at Alexander, recognition of the union, and application of the old contract to the new plant. It essentially demands that the employer abandon both its bargaining goals, and the reasons therefor; i.e., to place all applicants at the new plant on an

equal footing, to avoid transfers with full seniority and benefits, and to hire personnel from the new location.

If this remedy stands, 8(d) would be rendered meaningless. Any bargaining order based on concomitant findings of bad faith and anti-union motivation (which motivation the Board here infers not separately, but solely from the 8(a)(5) findings), could require complete agreement to the union proposal as the remedy, and thus preclude the right to bargain on substantive terms. Indeed, the decision disavows the need to find motivation in the 8(a)(3) context, saying only that the employer's actions carried their own indicia of intent. (Appendix B, pp. 38a and 39a).

It is submitted that where a remedy compels private agreement, which this clearly does, and where the findings are based solely on an evaluation of the employer's bargaining position, as in this decision, then the fundamental purpose of the Act — private bargaining under government supervision — is violated. This becomes no more than forced submission to one side's demands under the guise of a remedy for discrimination.

2. *In The Cases Involving Transfers To New Plants, The Circuit Courts Are Split On The Issues Of "Reinstatement" and "Backpay".*

The reinstatement and backpay order derives from a finding based on the assumption that employees whose names were on an unofficial transfer list would have transferred.

The Second and Ninth Circuits both held in similar enforcement cases that forced reinstatement and backpay settlements are not proper without bargaining. The District of Columbia Circuit, in the decision below, would now uphold a different rule.

The divergence of opinion is illustrated by the case of *Cooper Thermometer Company v. N.L.R.B.*, 376 F.2d 684 (C.A. 2, 1967), where the Second Circuit spoke to the issues of reinstatement and backpay saying, respectively: "We think the reinstatement offer should be on whatever basis emerges from good faith bargaining between Cooper and the union" (376 F.2d at 690); and, "Recognizing there can be no ideal solution, we think that in this case backpay also should be based on the results of the bargaining now ordered . . . ."

Further, the Second Circuit in *Cooper* spoke directly to the 8(d) issue, saying:

> A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress' direction in [Section] 8(d) that the obligation to bargain 'does not compel either party to agree to a proposal or require the making of a concession'. 376 F.2d at 690

The Ninth Circuit in *Fraser & Johnston Company v. N.L.R.B.*, 469 F.2d 1259 (C.A. 9, 1972), agreed with the Second Circuit, saying: "We think that the rate of pay

should be that produced by this bargaining." (469 F.2d at 1265)

These courts also recognized that reinstatement and backpay orders are dependent on a finding that employees would have transferred. There, as here, the Board relied on lists of employees. There, unlike here, the circuits rejected the use of such lists, finding them unreliable. This decision upholds the use of union lists. Thus, the rule here again contradicts *Cooper* and *Fraser* and opens the door to speculative remedies. (Appendix B, pp. 18a, 20a, 21a, 42a).

3. *The Circuit Courts Are Split And The Decisions In Conflict On The Issues Of Recognizing The Union At The New Plant And Application Of The Old Contract As Part Of A Remedy.*

That part of the remedy ordering recognition and application of the old contract at the new plant is grounded on the conclusion that language in the old contract limiting its application to the Buffalo location has no force and effect. (Appendix B, pp. 40a and 41a).

The old contract plainly limited itself to the Buffalo plant. The Second, First, Ninth[15] and, until this decision,

[15] The following cases have all disavowed recognition or application of the old contract to the new facility: *Cooper Thermometer Company v. N.L.R.B.*, 376 F.2d 684-690 (C.A. 2, 1967), disavowing recognition; *N.L.R.B. v. Die Supply Co.*, 393 F.2d 462, 465 (C.A. 1, 1968), disavowing application of the old contract in refusal to bargain context; *Fraser & Johnston Co. v. N.L.R.B.*, 469 F.2d *(Continued on p. 15)*

the District of Columbia Circuits, all held that contractual language of geographical limitation cannot be ignored by either the National Labor Relations Board's contrary contractual interpretation, or a National Labor Relations Board finding that a majority of employees would have transferred based on the number of signatures in a transfer list.

Therefore, if the instant decision stands, it would be diametrically opposed to other decisions from the District of Columbia Circuit, as well as decisions from the Second, First and Ninth Circuit Courts of Appeal.

B. THIS CASE RAISES VITAL NEW ISSUES WITH RESPECT TO THE APPLICATION OF SECTION 8(a)(5) BY THE BOARD AND ITS USE OF INFERENCE UPON INFERENCE TO REACH CONCLUSIONS. IT ALSO PRESENTS AN APPARENT CONFLICT IN THE CIRCUITS RESPECTING THE NATIONAL LABOR RELATIONS BOARD'S USE OF INFERENCES AND ITS CATEGORIZATION OF EMPLOYER BARGAINING POSITIONS AS BEING IN BAD FAITH IN AND OF THEMSELVES.

The refusal to bargain decision is based on a matrix of indefensible legal conclusions and inferences which, if

(Footnote 15 Continued from p. 14)
1259, 1264 (C.A. 9 1972) disavowing recognition; *Local 57, International Ladies' Garment Workers Union (The Garwin Corp.) v. N.L.R.B.*, 374 F.2d 295, 300 (C.A. D.C., 1967), *Cert. Den.* 387 U.S. 942 (1967); *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143, 149 (C.A. 6, 1962), *Cert. Den.* 371 U.S. 941 (1962), disavowing recognition in a 301 suit to enforce a recognition clause in a collective bargaining contract.

upheld, would render both 8(d) and 8(a)(5) meaningless. The reasoning is an attack not upon bargaining conduct, but upon the positions taken by the employer on the transfer issue.

1. *This Decision Promulgates A Rule That Under No Circumstances Can An Employer's Obligation To Bargain On The Issue Of Transfers Be Fulfilled By A Counterproposal That Employees Continue At The New Plant As New Hires.*

The decision of the Administrative Law Judge, which has been reaffirmed below, rests on dictum expressed in *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (C.A. 1, 1953), where the First Circuit said:

> It is difficult to believe that the company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining. *id.* at 139

We believe that if the instant decision is upheld on the basis of *Reed & Prince, supra,* the Board will bind itself to the doctrine that an employer may neither refuse transfers nor respond in the negative to transfer proposals. Here, the employer said no, but qualified its refusal by saying employees would be hired if they agreed to start anew. What the employer did here was refuse to grant Buffalo employees a superior seniority status over the general applicant at Alexander.

The instant ruling effectively precludes employers from refusing transfers on any basis when old plants are closed and new ones opened. It basically upholds the superseniority condemned by this Court in *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

The Ninth Circuit rejected the National Labor Relations Board's use of this test for bad faith, and properly limited application of the *Reed & Prince* rule[16] in its decision of *N.L.R.B. v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 29 (C.A. 9, 1968). It said:

> We may also assume *arguendo* that in certain exceptional cases the extreme or bizarre character of a party's proposals may give rise to the persuasive inference that they were made only as a delaying tactic or that they should be viewed as a facade concealing an intention to avoid reaching any agreement. Such is the suggestion of *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir.), *Cert. Den.*, 346 U.S. 887 . . . and *Vanderbilt Products, Inc. v. N.L.R.B.*, 297 F.2d 833, 834 (C.A. 2, 1961). We believe, however, that such a principle, if accepted at all, must be narrowly restricted. Otherwise, the policy supporting Section 8(d)'s provision that the duty to bargain in good faith does not 'require the making of a concession' would be impermissibly undermined. 394 F.2d 26 at 29

[16] The NLRB recently recognized that the so-called *Reed & Prince* rule has not achieved the status of doctrine when it adopted the ALJ's decision in *Omaha Typographical Union No. 190 v. N.L.R.B.*, 220 NLRB, No. 161 (Oct., 1975), *affirmed* _____ F.2d _____ C.A. 8, 1976), Case No. 75-1833.

The rule set forth in the instant decision is not only contrary to the Ninth Circuit's decision in *MacMillan*, but also contrary to this Court's prior ruling in *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 404 (1952), where it said:

> The Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. 343 U.S. 395, 404 (1952)

This Court should resolve the conflict created in the circuits by this decision and the attendant threat to 8(d), by clarifying an employer's right to refuse a proposal, or counterpropose as it chooses, without fear of N.L.R.B. sanction evaluating and attacking the substantive terms of the employer's refusal or counterproposal. Indeed, the right to reject proposals and refuse to counter-propose is jeopardized by this decision.

2. ***The Decision Finds Bad Faith Because Petitioner Wanted To Hire From The Locale Of The New Plant Rather Than Staff The Plant Exclusively With Buffalo Employees. It Holds That This Position Precluded The Union From Effective Bargaining.***

If the rule on this important point stands, it would mean no employer in this type of case could insist upon the right to hire new employees from the locale of a new plant. It would effectively force employers to agree to

transfer prior employees at peril of incurring a National Labor Relations Board sanction for refusal on the ground that it wants to begin anew.

There are no direct rulings on this important issue. The rule of 8(d) would be grievously abused if this decision stands. It would seriously impair an employer's ability to close old facilities and build new plants in better labor markets, and would threaten the freedom to contract.

As this Court observed in *N.L.R.B. v. Insurance Agent's International Union*, 361 U.S. 477 (1960):

> The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended. But it remains clear that Section 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of the collective bargaining agreements. *id.* at 486. (citations omitted)

Petitioner submits that the Court should clarify this important point by setting forth guidelines respecting the National Labor Relations Board's judgment of the legitimacy of an employer's positions when bargaining over the closure of a facility, transfers, and the hiring of employees at new plants.

It is submitted that the injury to the free flow of commerce would be immense. Moreover, it would contradict the intent of Congress in passing 8(d).

3. *The Ultimate Conclusion Upholds The Improper Use Of Inference Upon Inference To Find Bad Faith.*

In *United States v. Ross,* 92 U.S. 281 (1875), this Court upheld the rule that an inference drawn from another inference is not an acceptable means of arriving at a conclusion. It said, "No inference of fact or law is reliable drawn from premises which are uncertain." *id.* at 283-284.[17]

The instant case would uphold a remote inferential finding of subjective bad faith based on a matrix of erroneous inferences. The court should assert jurisdiction and clarify this important rule in the context of reviewing administrative decisions. The Eighth Circuit recently observed in *Omaha Typographical Union No. 190 v. N.L.R.B.,* ___ F.2d ___ (C.A. 8, 1976), Case No. 75-1833, that the Board is charged in the first instance with determining whether bad faith may be inferred. We believe, however, that this charge cannot be fulfilled by abusing the use of inferences as was done here.

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[17] This Court has never wavered from the rule. *Chicago Milwaukee & St. Paul Ry. v. Coogan,* 271 U.S. 472, (1925). However, in more recent times, reviewing courts have rejected the rule or modified it in the criminal context and it is now often applied only to remote or speculative inferences. See e.g. *Howard v. U.S.,* 389 F.2d 287, 291 (C.A. D.C., 1967); *U.S. v. Ravich,* 421 F.2d 1196, 1204 (C.A. 2, 1970), *cert. den.* 400 U.S. 834.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDICES

APPENDIX A

FORM NLRB-501 (2-67)

Form Approved
Budget Bureau No. 64-R001.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.	DO NOT WRITE IN THIS SPACE Case No. 3-CA-5516 Date Filed December 23, 1973

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer	b. Number of Workers Employed
Allied Mills, Inc.	about 47

c. Address of Establishment (Street and number, city, State, and ZIP code)	d. Employer Representative to Contact	e. Phone No.
11 Bolton Place Buffalo, New York 14210	Jack Williams Plant Manager	

f. Type of Establishment (Factory, mine, wholesaler, etc.)	g. Identify Principal Product or Service
Milling Plant	Poultry and Dairy Feed

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) ~~and~~ (3) and (5) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

(SEE ATTACHED SHEET)

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

American Federation of Grain Millers, Local 110

4a. Address (Street and number, city, State, and ZIP code)	4b. Telephone No.
c/o Peter Rybka 4 Cathedral Park, Buffalo, N.Y 14202	A/c 716 853-1184

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

American Federation of Grain Millers

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Jacobs, Gore, Burns & Sugarman

By Martin J. Burns (Signature of representative or person filing charge) Counsel (Title, if any)

Address 201 N. Wells Street - Suite 2122, Chicago, Illinois 60606 A/c 312 372-1646 (Telephone number) Dec. 26, 1973 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 788-071

BEST COPY AVAILABLE

(ATTACHED SHEET TO CHARGE)

Since on or about July 5, 1973, the above named employer, through its officers, agents and representatives, has violated the Act by the following:

(1) By failing and refusing to bargain collectively and in good faith with the Charging Party, the collective bargaining representative of its employees at the Buffalo plant, as to the employer's decision to close said plant and terminate operations;

(2) By failing and refusing to bargain collectively and in good faith with the Charging Party as to the effects of the plant closing on the employees represented by the Charging Party;

(3) By unlawfully attempting to escape and avoid its obligations under the Act through the closing of the Buffalo plant and the transferring of bargaining unit work to another plant at a nearby location;

(4) By failing and refusing to bargain in good faith with the Charging Party as to the transfer of bargaining unit employees to the new plant at Alexander, N. Y. and by discriminating against said employees as to transfer or hire at said new plant.

By these and other acts the above named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRD REGION

Case No. 3-CA-5516

ALLIED MILLS, INC.

and

AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 110, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

It having been charged by American Federation of Grain Millers, Local 110, AFL-CIO, herein called the Union, that Allied Mills, Inc., herein called the Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act, the General Counsel for the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Third Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I

The original charge was filed by the Union on December 28, 1973, and served on Respondent by registered mail on or about December 28, 1973.

II

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Indiana.
(b) At all times material herein, the Respondent has maintained its principal office and place of business at 110

Wacker Drive, in the City of Chicago, and State of Illinois.
(c) At all times material herein, until on or about December 28, 1973, Respondent maintained a place of business at 11 Bolton Place, Buffalo, New York, herein called the Buffalo plant and since on or about January 1, 1974, has maintained an office and place of business on Telephone Road in Alexander, New York, herein called the Alexander plant, and is, and has been at all times material herein engaged at said plants in the manufacture, sale and distribution of livestock and poultry feed and related products. The Respondent's Buffalo and Alexander plants are the only plants involved in this proceeding.
(d) During the past year, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed at said Buffalo and Alexander plants, products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said plants directly to States of the United States other than the State of New York.

III

The Respondent is, now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV

At all times material herein, the following-named persons occupied positions set opposite their respective names, and have been and are now agents of the Respondent at its Buffalo and Alexander plants, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act.

Jack Starkey — Acting Plant Superintendent and
Alexander Plant Superintendent
Jack Williams — Plant Manager
Robert Gamlin — Plant Superintendent
Frank Christopher — Buffalo Night Supervisor

An Unnamed Agent —

V

The Union, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

VI

Since on or about mid-September 1973, and continuing to date, Respondent has interfered with, restrained and coerced, and is interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act by the following acts and conduct:

Respondent, by its following-named supervisor and agent, on or about the dates and places set opposite his name, threatened, and restrained its employees by stating that Respondent would not transfer or accept for employment at its Alexander plant any employees of the Buffalo plant who were members of or affiliated with the Union.

mid-September 1973	Jack Starkey	Acting Plant Superintendent's office at the Buffalo plant
October 1973	Jack Starkey	Acting Plant Superintendent's office at the Buffalo plant.

VII

All production and maintenance employees of the Respondent employed at its Buffalo plant, and/or Alexander plant, excepting office and clerical employees, supervisory employees, laboratory employees, foremen, buyers, and salesmen constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

VIII

Since 1938, and at all times material herein, the Union has been the duly designated and certified representative for the purpose of collective bargaining in the unit described in paragraph VII, above, and by virtue of Section

9(a) of the Act, it has been and is now the exclusive bargaining representative of all employees in the said unit for the purposes of collective bargaining with respect to rates of pay, hours of employment, and other terms and conditions of employment.

IX

Since 1938, the Union and Respondent have entered into successive collective bargaining agreements, of which the most recent collective bargaining agreement became effective on July 2, 1971 and by its terms, expires on June 30, 1974.

X

Commencing on April 21, 1973, and continuing to date, the Union has requested the Respondent to bargain collectively in regard to the transfer of its members in the unit described above in paragraph VII, from the Buffalo plant to the Alexander plant, and other terms and conditions of employment as the exclusive bargaining representative of all of Respondent's employees in the said unit.

XI

Commencing on or about July 5, 1973, and at all times thereafter, the Respondent, through its agents and representatives Jack Williams, Robert Gamlin, and an unnamed agent, has refused to and continues to refuse to negotiate with the Union in good faith over the transfer of the employees in the unit described above in paragraph VII to Respondent's Alexander plant.

XII

Since on or about July 5, 1973, and continuing to date, the Respondent, through its agents and representatives, has discriminated and is discriminating against its employees in the unit described above in paragraph VII at its Buffalo plant, by refusing to transfer said employees to its Alex-

ander plant because said employees were members of or assisted the Union or engaged in other union activity or concerted activities for the purpose of collective bargaining or mutual aid or protection.

XIII

Since on or about December 28, 1973, the Respondent did terminate its employees described above in paragraph VII at its Buffalo plant, because said employees were members of or assisted the Union or engaged in other union activity or concerted activities for the purpose of collective bargaining or mutual aid or protection.

XIV

Since on or about the date of the terminations referred to above in paragraph XIII, Respondent has failed and refused and continues to fail and refuse to transfer said employees to the Alexander plant, because said employees were members of or assisted the Union or engaged in other union activity or concerted activities for the purpose of collective bargaining or mutual aid or protection.

XV

At all times material herein, the Respondent has failed and refused and has continued to fail and refuse to abide by the terms of or give any force or effect to the current collective bargaining agreement in paragraph IX above at Respondent's Alexander plant.

XVI

Since or or about December 28, 1973, Respondent has refused to recognize the Union as the collective bargaining representative of its employees described in paragraph VII above at its Alexander plant at a time when the Union was and still is the duly designated representative for the purpose of collective bargaining of said employees but for the unlawful acts of Respondent alleged above in paragraphs XI, XII, XIII, XIV, and XV.

XVII

By the acts described above in paragraphs VI, XI, XII, XIII, XIV, XV, and XVI, and by each of said acts, the Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

XVIII

By the acts described above in paragraphs XII, XIII, and XIV, and by each of said acts, Respondent did discriminate, and is discriminating, in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and Respondent thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

XIX

By the acts described above in paragraphs XI, XV, and XVI, and by each of said acts, Respondent did refuse to bargain collectively, and is refusing to bargain collectively, with the representatives of its employees, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

XX

The acts of Respondent described in paragraphs VI, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII and XIX, above, occurring in connection with the operations of Respondent described in paragraphs II and III, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to

labor disputes burdening and obstructing commerce and the free flow of commerce.

XXI

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 23rd day of April, 1974, and consecutive days thereafter until concluded, at 10:00 a.m., Eastern Daylight Saving Time, in the National Labor Relations Board Hearing Room, Federal Building, 9th Floor, 111 West Huron Street, Buffalo, New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED at Buffalo, New York, this 5th day of March 1974.

/s/_____
THOMAS W. SEELER, Regional Director
National Labor Relations Board
Third Region
Federal Building, 9th Floor
111 West Huron Street
Buffalo, New York 14202

APPENDIX B

JD-540-74
Buffalo, N. Y. and
Alexander, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 3-CA-5516

ALLIED MILLS, INC.

and

AMERICAN FEDERATION
OF GRAIN MILLERS,
LOCAL 110, AFL-CIO

Margaret J. Quinn, Esq.,
for the General Counsel.
Charles A. Kothe, Esq.
and *Lynn Paul Mattson, Esq.*
(Kothe and Eagleton),
Tulsa, Okla., for the Respondent.
Charles Orlove, Esq.
(Jacobs, Gore, Burns and Sugarman),
Chicago, Ill., for the Charging Party.

DECISION

Statement of the Case

ROBERT COHN, Administrative Law Judge: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, (the Act) was tried before me at Buffalo, New York, on 6 hearing days commencing May 1, 1974 and ending May 8, 1974. The original charge was filed by the American Federation of Grain Millers,

Local 110, AFL-CIO (the Charging Party or Union) on December 28, 1973, and the complaint issued on March 5, 1974. Allied Mills, Inc. (the Company or Respondent) duly filed its answer within the time extended by the Regional Office of the National Labor Relations Board, on April 1, 1974.

The principal issue raised by the pleadings is whether the Respondent violated Section 8(a)(1), (3) and (5) of the Act when, on December 31, 1973,[1] it closed its Buffalo plant, and failed and refused to transfer any of the employees represented by the Union to a newly constructed, similar operation at Alexander, New York located approximately 30 miles away.

Upon the entire record,[2] including my observation of the demeanor of the witnesses,[3] and the briefs filed by counsel for all parties, I make the following:

Findings of Fact

I. Commerce

Respondent, an Indiana corporation with its principal office and place of business in Chicago, Illinois, is, and has been at all times material, engaged in the business of manufacture, sale and distribution of livestock and poultry feeds, and related products. In the course and conduct of its operations, it maintains production facilities in many states of the United States including the States of New

[1] All dates hereinafter refer to the calendar year 1973 unless otherwise indicated.

[2] Subsequent to the close of the hearing, counsel for General Counsel and counsel for Respondent each filed Motions to Correct Transcript of Proceedings. These Motions should be, and hereby are, Granted. In addition, the transcript of proceedings should be corrected at p. 414, 1. 18, to read "1965" instead of "1955."

[3] Cf. *Bishop and Malco Inc., d/b/a Walker's,* 159 NLRB 1159, 1161.

York and Pennsylvania; however, the only plants involved in this proceeding are those located in Buffalo, New York (the Buffalo plant) until December 31, 1973, and in Alexander, New York, (the Alexander plant) thereafter.

During the past year, Respondent, in the course and conduct of its operations, manufactured, sold and distributed at said Buffalo and/or Alexander plants products valued in excess of $50,000 of which products valued in excess of $50,000 were shipped from said plants directly to states of the United States other than the State of New York.

I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organication Involved

The Union, which admits into membership employees of the Respondent, and exists for the purpose, in whole or in part, of dealing with employers concerning conditions of employment, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

The Respondent operated the Buffalo plant for many years prior to 1973. The record establishes that it had recognized the Union as the collective-bargaining representative of its production and maintenance employees since 1938, and had entered into successive collective-bargaining agreements with the Union since that time. The last collective-bargaining agreement between the parties was entered into on July 2, 1971, and was scheduled, according to its terms, to remain in force until June 30, 1974. At some point in time (not clearly defined in the record), the management of Respondent determined that

the Buffalo plant was too old, inefficient and uneconomic for profitable operations, and determined to close it. It also determined (presumably at about the same time) to construct two new facilities in Western New York to substitute for and carry on the manufacturing and distribution functions of the Buffalo plant at the Alexander plant and also a plant which was constructed in Sangerfield, New York, which is approximately 150 miles from Buffalo. When the Union first learned of the Company's plants, primarily through newspaper clippings (see, e.g. General Counsel's Exhibit No. 17),[4] it sought to meet with the Company for the purpose of discussing what effect such plans would have on the Buffalo operation. The Company agreed, and such meetings were held on July 5, October 12, and November 13. At the meetings, the Company was willing to, and did, discuss with the union representatives the impact of the impending closure of the Buffalo plant on the production and maintenance employees represented by the Union, within the parameters of the existing collective-bargaining agreement. However, the Company adamantly refused to discuss the transfer of the Buffalo employees of the Alexander plant.[5] The Company contends that it was always willing to consider applications for employment of the Buffalo employees at the Alexander plant as new employees, but that no such applications were ever filed. It concedes that it did not desire to move or transfer the Buffalo employees to Alexander in a group, and have them carry along with them the collective-bar-

[4] Although the Company, in prior collective-bargaining negotiations, continually held out the threat of closure of the Buffalo plant to the Union as a lever to secure concessions, it never did directly notify the Union of its plans to construct the new facilities until after the Union learned about it from other sources.

[5] There is no clause in the collective-bargaining agreement relating to transfers of employees from one of the Company's plants to another.

gaining agreement which was then existing between the Company and the Union.

The Alexander plant commenced operations around the first of November, and was staffed (as far as production and maintenance functions are concerned) with newly hired employees from the Alexander area.

B. *The Issues*

1. Did the Union, by agreeing to the severance clause in the collective-bargaining agreement, waive its right to complain concerning the Company's refusal to transfer the Buffalo plant employees to Alexander.

2. If not, did the Company bargain in good faith with the Union respecting the effect on the Buffalo employees of the Company's closure of the Buffalo plant.

3. Did the Company's failure and refusal to transfer the Buffalo employees to the Alexander plant constitute discrimination to discourage membership in the Union, in violation of Section 8(a)(3).

4. Did certain statements in conversations between Acting Plant Superintendent Starkey and several employees of the Buffalo plant, in September, constitute interference, restraint and coercion of employees in violation of Section 8(a)(1) of the Act.

C. *The Negotiating Sessions*

As previously indicated, union representatives became aware of the construction of the Company's new plants in western New York in the latter part of 1972. However, it was not until the following April that they finally directed a written communication in the form of a letter to George Bard, manager of the labor relations department of the Company, requesting a meeting for the purpose of discussing the effect of such new plants on the Buffalo

operation. After some exchange of correspondence, a meeting was finally agreed upon to take place in Buffalo on July 5. The meeting was held at a local restaurant during the dinner hour, and the following persons participated: For the Union were Peter Rybka, a local officer as well as an international vice-president, and John Stoczynski, business representative of the local; for the Company were Bard and Jack Williams, manager of the Buffalo plant. It was at that meeting that the union representatives learned, for the first time, that the Respondent intended to close the Buffalo plant sometime in the latter part of 1973, although a specific date was not mentioned at that time. Discussion then turned to the effect of such closure on the employment opportunities for the Buffalo employees. The Union was naturally desirous of obtaining continued employment for as many of its members as desired transfer to the employer's new facility as Alexander. However, when it became known that the new plant, being more automated and computerized, would not have as high an employee complement as Buffalo, it became obvious that the Company could not physically employ all of the Buffalo employees assuming that all of them desired to transfer.[6]

Under the circumstances, Rybka proposed to the Respondent what is referred to in the record as the "Agway Plan."[7] The essential elements of this plan, which Rybka

[6]The employee complement at Buffalo was, at the time, approximately 50; Respondent did not contemplate that it would hire more than approximately half that number at Alexander.

The collective-bargaining agreement between the parties at the Buffalo plant contains a union-security clause; accordingly, all the production and maintenance employees at the Buffalo plant were members of the Union.

[7]It derives its name from an agreement arrived at between the Union

(footnote continued on p. 17a)

had recently negotiated with the Agway Company, were that the Company would be able to choose, without regard to seniority, the number of employees which it would require at the new facility and to pay them at a lower per hour rate than was required in the existing agreement, such hourly rate to be in accord with that prevailing in the new area.[8]

The Company declined Rybka's suggestion. As Bard testified, "I rejected the concept of picking people up in the Buffalo plant and setting [them] down in Alexander." He also testified that although he regarded Rybka's offer as a proposal, he chose not to make a counterproposal either at that time or at any time during the subsequent negotiations.

Other subjects were discussed such as vacations, severance, retirement and hospitalization. The Company indicated its willingness to comply with the collective-bargaining agreement as respects these matters, and that Bard would counsel individually with the employees respecting their individual desires as to these subjects. Rybka acquiesced,[9] and Stoczynski proposed that the Company give a 90-day closing notice to employees. Such notice would allow any employee to be able to quit within the 90-days without loss of severance pay, assuming the Com-

(footnote continued from p. 16a)

and the Agway Company, a feedstuff manufacturer and competitor of the Respondent. The Agway Company had also maintained a facility in Buffalo, but had recently built a new plant in Batavia, New York, also located approximately 30 miles from Buffalo.

[8]According to the record, this would be 40 cents per hour under the prevailing Buffalo rate.

[9]Consequently, neither the General Counsel nor Union contend that the Company violated Section 8(a)(5) through Bard's subsequent meetings with individual employees outside the presence of a union representative.

pany was able to release him from his duties. The Company tentatively agreed to this proposal, and this was apparently the only agreement reached between the parties at that session (other than, of course, the stipulation that the Company could counsel individually with the employees respecting early retirement, severance pay, etc.)

On July 20, Bard dispatched the letter to Rybka in which he confirmed the Company's agreement respecting the 90-day notice provision, and also included a "spread sheet" which delineated the approximate severance and retirement benefits that the employees would be entitled to at the time of the closing of the plant, or in subsequent years when they attained retirement age. Bard reaffirmed his intention to sit down with each employee and explain the benefits following the Company's announcement of the plant closure.

On or about August 10, the Union posted a notice to its members on the bulletin board of the Buffalo plant. Such notice advised the employees that "the future operations of Allied Mills is very uncertain," and that contact had been had with company officials to clarify the future status of the Company in Buffalo. It further advised the employees of benefits to which they would be entitled in the event of the plant closing, and of the 90-day closing notice. Finally, it advised the employees that the Union hoped to discuss with the Company, "in the very near future, opportunities for employees at the Buffalo plant to transfer to the Company's new plant at Alexander, New York." In that connection, the Union caused to be placed on the bulletin board a yellow sheet of paper (from a legal pad) which was written on it: "Men For New Plant Sign Below." This list was maintained for several months subsequently, as discussed more fully below.

In a letter dated September 10, the union represen-

tatives requested another meeting with the Company, particularly with respect to the issue of transfers. In that letter it was pointed out that the union representatives were aware of the fact that the "nonunion office employees at the Buffalo plant are being given this opportunity [of transfer] by the Company. We feel that we are entitled to the same consideration." After some exchange of correspondence, a meeting date of October 12 was agreed upon.

The October 12 meeting was held in a local hotel in Buffalo, and commenced on the morning of that day. Present for the Union were Rybka and two employees from the plant who were union stewards: Dan Keough and John Wantuck; for the Company were Bard, Williams and Robert Gamlin, the plant superintendent. Although the record reflects that other matters such as vacations, severance, hospitalization, etc., were discussed at the meeting, the principal issue was that of transfer of Buffalo employees to Alexander. The Company's position remained adamant that there would be no transfers. One of the reasons for this position, as stated by Respondent's representatives, was that the Company had an obligation to Genesee County, i.e., that since the people in that county built the plant, the Company felt an obligation to hire persons in that locality.[10] In addition, Williams stated that the employees in the Buffalo plant were too union oriented, and militant, and pointed to a couple of wildcat strikes which had apparently occurred in the past. Finally, Williams adverted to the fact that the Alexander plant contained new machinery some of which it was felt that the Buffalo plant employees were not capable of

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[10] This was apparently a moral obligation only since the written contract, which was present at the hearing although not received in evidence, contained no such obligation.

Buffalo is located in Erie County.

operating.[11] Nevertheless, Rybka presented to the company representatives a list of names of those employees who had signed the list for the purpose of indicating the desire to transfer to the Alexander plant. The list contained approximately 18 names and concededly was not complete in that it did not contain any employees who worked on the night shift. Rybka said that these names would be submitted shortly. Bard's reply was that the Union could submit such a list but that it would not do any good.[12]

On the morning of November 13, in the locker room of the Buffalo plant, Bard met with some of the older employees who were eligible for retirement, and explained to them the advantages and disadvantages of early retirement as opposed to termination. That afternoon there was a meeting between the Company and the Union at a local hotel. Present at that meeting were the same participants

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[11] The foregoing findings are based upon the credited testimony of Rybka, Wantuck and Keough, some of which was not denied by the management representatives. The latter did deny that either of them made any statement to the effect that they did not want a union in Alexander. I have some doubt that a statement in that blunt form was made; however, it might very well have been reasonably inferred from Williams' statements respecting the militancy of the Buffalo employees.

[12] This finding is based, again, on the credited testimony of Wantuck and Keough, both of whom impressed me as honest witnesses. Bard testified that he did not *think* that he said anything to the effect that it would not do any good to submit a list.

At that meeting the Company representatives claimed that they advised the union representatives that the employees at Buffalo were privileged to file applications for employment at Alexander. This was denied by Rybka. I deem it unnecessary to resolve this particular credibility conflict for the purpose of resolving the ultimate issue, and will assume the veracity of the Company representatives' testimony on this point.

as at the October 12 meeting with the addition of John Stoczynski.[13] This was apparently a rather short meeting since the Company declined to change its position on any item since the October 12 meeting. With respect to transfers, the Company gave the same reasons as previously, i.e., that the plant and the machinery were new and the people were too old to be trained to operate it. Also, they were too "union oriented", which would result in problems such as shut downs, and it was suggested that if the union representatives wanted a union in Alexander, that they should go ahead and try to organize it.[14]

On November 20, Rybka and Stoczynski dispatched a letter to plant manager Williams attaching a list of employees "who are interested in an opportunity for transfer to your Alexander plant." The list of names was in the same hand writing, in that was copied by one of the shop stewards from the original list which was posted on the plant bulletin board, as aforesaid.[15] The Company never responded to that letter.

In November, the Company commenced placing "help wanted" ads in local papers seeking personnel for employment at the Alexander plant. The ads stated that interested personnel could contact either the Buffalo plant or the plant superintendent in Alexander (see General Counsel's Exhibit No. 10).

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[13] Stoczynski was not present at the October 12 meeting because of illness.

[14] Credited testimony of Stoczynski. There was also some discussion of the possibility of securing a tax advantage for employees by paying the severance pay in 1974 rather than 1973. However, after some investigation, it was apparently concluded that this would not be feasible.

[15] See General Counsel's Exhibit No. 9, and compare with General Counsel's Exhibit No. 11.

On December 27, Bard was at the Buffalo plant for the purpose of securing commitments from the Buffalo employees with respect to early retirement or severance pay. Rybka, who apparently had been advised previously that Bard would be at the plant that day, was also there for the purpose of advising the employees not to sign any waiver of their rights. Bard advised Rybka that he had not received the list of employees who desired to transfer to Alexander. Rybka proceeded to get a photo copy of the list (General Counsel's Exhibit No. 11), and hand delivered it to Bard at that time. He also sent a letter to Williams naming three additional employees (General Counsel's Exhibit No. 12). No response was made by the Company to the receipt of these lists.

As previously noted, the Buffalo plant closed on December 31.[16]

D. *Alleged Interference, Restraint and Coercion*

The complaint alleges that in September and October,

[16] There is some disputed testimony in the record with respect as to whether the Company, in December, made available to the Buffalo employees applications for employment at Alexander. Gamlin testified that on one day in early December he announced at a lunch break to the employees that he would be glad to give any employees that wanted one an application which, upon completion, should be taken to the Alexander plant and given to Superintendent Starkey. No employee took an application. Several employees, witnesses for the General Counsel, testified that they were unaware of such offering. However, I will assume, for the purpose of resolution of the ultimate issue, the credibility of Gamlin on this point.

Gamlin also testified that on one occasion in December, a management representative from a Buffalo foundry company, apparently having learned of the Respondent's decision to close the Buffalo plant, requested permission to solicit the Buffalo employees for employment at the foundry. This permission was granted and on one occasion a representative of the foundry came into the plant and distributed applications for employment to the employees.

the Respondent violated Section 8(a)(1) of the Act when acting plant superintendent Jack Starkey told employees that "Respondent would not transfer or accept for employment at its Alexander plant any employees of the Buffalo plant who were members of or affiliated with the Union." In support of such allegation, Danny Keough, an employee and shop steward, testified that in September he was in Starkey's office, and had a conversation with him. The time of the conversation was subsequent to the Respondent's posting of a notice to employees on or about September 26, announcing the closing of the Buffalo plant as of December 31. Keough questioned Starkey as to what the latter intended to do when the plant closed. Starkey responded that he was going to be the superintendent of the Alexander plant. Keough inquired, "Are they going to take any men down there?" Starkey responded that as long as he was superintendent there would never be a union if he could help it — that he did not want a union because he did not want "anybody dictating to me."[17]

John Wantuck testified that in September he had a conversation with Starkey in the latter's office wherein Starkey announced that he would be the new superintendent in Alexander. Wantuck opined that Starkey might return to his old employment. Starkey responded that there was no union at his prior employment and that if Buffalo employees worked at a place where there was no union, "half of you guys would have been fired. The only thing that saves you guys is by having a union here . . . ."

In October, Wantuck had another conversation with Starkey which he advised the latter that some of the men

[17] Employee Steven Szczesek walked into Starkey's office during the conversation and heard the latter state that there would be no union men at the Alexander plant because he did not "want anything to do with Unions."

wanted "transfer applications" for the Alexander plant, to which Starkey replied that he did not have them at the Buffalo plant and that the men would have to come to Alexander to get them. As Wantuck was walking away, Starkey added, "you guys know I'm a big prick but I will be a bigger prick when you guys come out to fill out the applications."[18]

On one occasion in October or November, Starkey was dissatisfied with the work from the millwrights, and told Sherrill Schrader (in the presence of Steven Szczesek) that if it was not for the Union, he (Starkey) would "get rid of the whole crew of them." Starkey further observed that if the Company had a union in the new plant, he did not want any part of it because he just did not believe in unions."

In his testimony, Starkey denied that he ever said to any person, that as long as he was superintendent at Alexander there would never be a union there. However, I am unable to believe that the employees fabricated the antiunion statements attributable to Starkey. Some of these statements are purely matters of opinion and therefore protected under Section 8(c) of the Act. However, such

[18] Chester Chmielowiec overheard a portion of this conversation. He testified that he heard Wantuck ask Starkey for applications and the latter said that "they are not taking anybody," and that if anyone wanted an application he would have to go to Batavia (Alexander) to get one.

Starkey denied saying that he would be a bigger prick at Alexander. I deem it unnecessary to resolve this particular credibility point since even if Starkey made such a statement, it would not seem necessarily related to interference with union or concerted activities. However, I do credit the employees' testimony as respects to the effect that the Company was not "taking anybody" to Alexander. In addition to demeanor considerations, I note that this position is essentially consistent with the position taken by the Respondent in the negotiations.

statements as (1) the Company was not taking any of the employees to Alexander, and (2) there would never be a union in Alexander, clearly overstepped the bounds of opinion, and, in my view, were statements calculated to intimidate the employees respecting their adherence to the Union should they also desire continued employment with the Company at Alexander. As such, they constituted interference, restraint and coercion of employee rights under Section 7 of the Act, in violation of Section 8(a)(1). I so find.

E. *Operations at Alexander versus those at Buffalo*

There is substantial testimony in the record respecting a comparison on the operations of the Buffalo and Alexander plants and of the job functions of the employees therein. Such evidence may be summarized briefly as follows:

Both plants are "feed mills." That is to say, raw materials, primarily in the form of grains, are shipped by truck or rail to the mill, mostly in bulk form. Some of these raw materials require no processing at all, and are merely unloaded and placed in bins in the warehouse; other raw materials have to be ground by mills. Respondent employed (and employs) employees at both plants who perform this unloading, weighing and warehousing functions. Such employees utilize substantially similar equipment such as "bobcats" and forklift trucks.[19]

Grains which require mixing with other ingredients are processed by machinery which, at both plants, is controlled by a panel board operator. That is, the product is mixed by a pre-arranged formula; at Buffalo, the process was described as "semi-automatic" while at Alexander, the

[19] Indeed, some of this equipment was transferred from the Buffalo plant to Alexander at the closing of the former operation.

process is more sophisticated and computerized. Nevertheless, it is controlled by a panel board under the supervision of a panel board operator.

Following this process, the product either goes to the bulk bins if it is to be loaded as bulk, or sent to the pellet mills if it is to be manufactured in the form of pellets and packaged. In either case, it is then stored and subsequently shipped to customers, either by truck or rail, or the customers pick up the product at the Respondent's loading dock in their own vehicles. At both plants, the Respondent hired (or hires) employees to perform the warehousing and shipping functions.

At both plants, Respondent hired (or hires) employees who perform maintenance functions. At Buffalo these functions were delineated by job classifications such as millwright, oiler, electrician, etc. At Alexander these functions are grouped together under a heading "maintenance", and one employee may perform more than one function. Indeed, at Alexander, the Respondent has grouped its employees into four major categories (warehousemen, packaging, panel board operator and maintenance) whereas at Buffalo the job classifications were more numerous and particularized (see Exhibit "B" attached to the collective bargaining agreement, General Counsel's Exhibit No. 2).

In short, the same raw materials that formerly came to Buffalo now come to Alexander; the same product is made there, and substantially the same customers are serviced from there. Due to the more efficient and sophisticated machinery at Alexander, the production process is performed more efficiently with substantially fewer employees. When asked what the difference was between the production functions in the two plants, plant manager Williams replied, "Basically it has to do with numbers and multiple jobs." That is to say that, as previously explained,

one employee at Alexander, due to the more advanced machinery, can perform more jobs in different places in the plant, and the same is true of maintenance functions.[20]

Analysis and Concluding Findings

I. The Waiver Theory

As previously indicated, the Respondent contends that by agreeing to a severance clause in the current collective-bargaining agreement, the Union waived all rights to complain concerning the Respondent's failure and refusal to transfer Buffalo employees to Alexander. I find this contention to be unsupported in fact and in law.

The severance clause was first agreed upon and inserted in the 1965 agreement between the parties. Section 4 of article XVI states as follows:

> In the event all production of the Company's Buffalo, New York plant is permanently discontinued during the term of this agreement, then and in that event each employee with five or more years of seniority who is laid off after July 1, 1965 and prior to July 1, 1968, shall receive 10 hours pay at his base rate for each year of seniority that he had accrued on the date of his layoff, but not to exceed 200 hours pay. Any employee receiving pay under this paragraph 16.4 shall forfeit all recall rights.

In 1968 the foregoing clause was improved to the extent that an employee with the same number of years of seniority shall receive 40 hours pay at his base rate for each year of seniority . . . but not to exceed 800 hours pay. No further improvement was made in the 1971 negotiations between the parties, and the clause is contained

[20] As of April 1, 1974, there were approximately 21 or 22 employees at Alexander; in the fall of 1973, there were approximately 45 to 50 production and maintenance employees at Buffalo.

in the current collective-bargaining agreement in the same language as above-quoted with the exception of the additional hours, as aforesaid.

Respondent argues that the severance clause "waives continued employment or 'recall rights' in the event of plant closure." (Respondent's brief, page 115) This is not exactly accurate since the clause only provides severance pay "in the event all *production of* the Company's Buffalo, New York plant is permanently discontinued during the term of this agreement." It is true that all production *at* the Buffalo plant was permanently discontinued, but the production of product was continued in substantially the same manner at Alexander. The clause does not indicate on its face — nor is there extrinsic evidence — that the parties contemplated a removal of the production facilities instead of a permanent discontinuance thereof.[21] Moreover, if Respondent actually believed the clause operated as a waiver, it would seem that it would have so contended at one or more of the meetings between company and union in 1973, or in some of the correspondence relating to the subject matter. But there is not a scintilla of evidence of any such contention. In short, the argument appears to be an afterthought.

Finally, as Respondent recognizes in its brief, the law is well established that "a waiver of a statutory right is not to be lightly inferred but must be 'clear and unmistakable.' "[22] It is abundantly clear from the facts in this case that the Union, neither by its words nor conduct,

[21] Respondent was allowed to, and did, make an offer of proof as to what transpired at the negotiations in 1965. There is nothing in such offer of proof to indicate that the parties contemplated removal of production facilities from Buffalo to another location.

[22] *New York Mirror,* 151 NLRB 834, 839; see also *N.L.R.B.* v. *Otis Elevator Company* 208 F. 2nd 176, 179 (C.A. 2).

indicated a waiver of its statutory rights to bargain concerning the transfer of employees from the Buffalo to the Alexander plant.[23]

II. The Alleged Refusal to Bargain

The complaint alleges that at all times since July 5, Respondent has refused to negotiate with the Union in good faith over the transfer of the employees from the Buffalo plant to Alexander. Respondent denies this allegation, and asserts that even though it was not required to because of the "waiver" issue discussed above, nevertheless it did meet with the Union when requested to do so, discussed all relevant issues, made some concessions, and, in general, fulfilled its obligation under Section 8(a)(5) of the Act. For the reasons cited below, in the light of applicable legal precedent, I do not agree that the evidence sustains the Respondent's position.

It should be noted at the outset that this is not a case involving an alleged unlawful decision to remove a plant for discriminatory reasons. The record shows that the Company and Union have existed together in a continuous contractual relationship at the Buffalo plant for a long number of years, and that the decision to remove the production facilities from Buffalo to Alexander was based predominately on economic considerations.[24] Nevertheless, there is substantial evidence in the record which convinces

[23] That the issue of transfers is a proper subject of effects bargaining is clear. See *General Motors Corporation,* 191 NLRB 951, (fn. 20).

Nothing in the recent case of *Valley Ford Sales, Inc.,* 211 NLRB No. 129, 86 LRRM 1407, detracts from this conclusion. There, a majority of the Board deferred to an arbitrator's award which held that the Union, by its conduct, had waived its right to object to the termination of an incentive plan.

[24] These considerations include the age of the Buffalo plant and the machinery therein; opprobrious taxing and environmental regula-

(footnote continued on p. 30a)

me, and I therefore find, that the Respondent utilized the move to rid itself of the Union as the collective-bargaining representative of the employees in the bargaining unit.[25]

In making such finding I have considered the following factors, no one of which is determinative, but which considered together reflect a determination by the Respondent to operate the Alexander plant unfettered by the presence of the Union — at least, not until it organized the newly-hired employees from the Alexander area.

1. Respondent concededly refused to discuss transfer of the Buffalo employees at any of the meetings with the Union in 1973. Labor Relations Director Bard testified as follows with respect to that point:

Q. Let me ask you this, is that how you deal generally with this Local that they have to ask you a question and then you answer?

A. No I made proposals to them.

Q. Any proposals with respect to transferring people?

A. No. Their proposal was the same all the way through and I rejected that.

Q. I am asking you, did you make any proposals to them, with respect to transferring people?

A. No we offered applications that the employees could put in for employment at Alexander and no one ever did.

Q. Your view then was that these employees would be hired as new employees?

(footnote continued from p. 29a)

tions imposed by governmental authorities in Buffalo which resulted in a high overhead for that plant; plus slow and inefficient service by transportation carriers available to the Respondent in Buffalo.

[25] See *California Footwear Company,* 114 NLRB 765, 767.

A. That's correct, they would receive their severance pay at Buffalo and be hired as new employees.

Q. If they were hired?

A. Yes.

This testimony, taken with Bard's earlier testimony that he "chose not to make a counterproposal" and that he "rejected the concept of picking people up in the Buffalo plant and setting them down in Alexander", make it abundantly clear that on the principal point of the negotiations, the Company refused to budge from its predetermined policy of refusing to transfer to Alexander any of the Buffalo employees represented by the Union.[26] Moreover, this is not a case where the Union was insisting upon a transfer of all employees or, indeed, upon any specific precondition of transfers. The evidence shows that it got no further than proposing a plan similar to the Agway agreement as a broach of the subject matter. However, the Company's representative testified that he assumed that Rybka would insist upon transferring the Buffalo employees "in bulk" or "in a group" with the contract wrapped around them. But the Company failed to test such assumption by making *any* proposals concerning individual transfers, either with or without the seniority, or other rights or privileges.[27] This case is therefore dis-

[26] This is in sharp contrast to its policy discussed more fully *infra,* of offering to transfer the unorganized, clerical employees and supervisors.

[27] That the company never intended to transfer any of the Buffalo production and maintenance employees to Alexander, either "in bulk" or individually, is attested by employees Steven Szczesek and Steven Nowadly. Both testified that in their individual conversations with George Bard concerning early retirement, they asked him about a transfer to Alexander. Bard replied that there would be no transfers — that "the company policy is not to take anybody from here, . . ."

tinguishable from the *Pierce Governor* case (164 NLRB 97) heavily relied upon by Respondent. In that case the Board found that the transfer issue was "fully explored" by the parties at two bargaining sessions and that the Respondent proposed that it would consider for transfer each Anderson employees who appeared at the plant, with seniority preserved for those hired. In the instant case, the transfer issue was never "full explored", and the Respondent never budged from its position that the only way that a Buffalo employee could become hired at Alexander would be to apply at Alexander as a new employee with no seniority or other privileges continuing from his employment at Buffalo.

It is also significant that unlike the situation in *Pierce Governor* where the Board found that the Respondent during the negotiations "explained its own position, and made counterproposals as well as some concessions,"[28] Respondent here made practically none. Thus the only "concession" made outside the confines of the contract was to give the employees a 90-day notice prior to closure within which they could find another job without sacrificing or forfeiting their severance pay, provided the Company could release them. The other "concessions" were merely to give employees options within the limitations of the contract as to whether they desired (1) early retirement rather severance pay, (2) pay in lieu of 1973 vacation, and (3) the granting to one individual the privilege to be laid off out of seniority. In *Pierce Governor*, the Board found that "Respondent was willing from the outset to discuss the subject of the effects of the move on Anderson employees in their transfer to Upland . . . and . . . the parties engaged in intensive and hard bargaining at a series of meetings and through an exchange of correspondence for a

[28] Id., at page 101.

3-month period."[29] Nothing comparable exists in this case. Here the Respondent, from the outset, simply refused to discuss the matter of the transfer of the Buffalo employees to Alexander.[30]

Indeed, the situation here is strikingly similar to that in *Cooper Thermometer Company*[31] There it was found after an analysis of the bargaining sessions, that Respondent at no time since the inception of the metings:

> ". . . departed from its basic position, in substance, that its obligation to bargain as to the effects of its move on the Pequabuck employees was limited to determining the rights of the employees deriving from within the four corners of the existing contract, as modified.[15]

[15] In Respondent's view, this would apparently include the extent of the employees' entitlement to vacation and insurance coverage benefits under the existing 1962 contract, as amended, and also severance pay.[32]

Citing *Cooper Thermometer*, the Trial Examiner in *Fraser & Johnston* stated:

> "The Board defined the bargaining obligation in those circumstances as requiring that the Union be afforded

[29] Id., at page 101.

[30] This is not to suggest of course, that the law requires a party to "make a concession or yield a position fairly maintained (citing cases). On the other hand, the parties are obligated to do more than merely go through the formalities of negotiation. There must be a 'serious intent to adjust differences and to reach an acceptable common ground,' *N.L.R.B.* v. *Insurance Agents Union*, 361 U.S. 477, 485 (1960)." See *Continental Insurance Company, et al.* v. *N.L.R.B.*, ____ F. 2d ____, (Slip. Op. at p. 2831-2832, C.A. 2, (April 9, 1974).

[31] 160 NLRB 1902, enforced in pertinent part, 376 F. 2d 684 (C.A. 2).

[32] Id. at page 1912.

an opportunity to bargain with respect to the contemplated move as it affected the employees, such as the placement of the employees in positions at the new plant."[33]

The Trial Examiner also commented upon the Board's decision in *Westinghouse Electric Corporation*, 174 NLRB No. 95, where the Board had occasion to define and distinguish "the *Cooper Thermometer* type" of plant removal case as —

> "Concerned with a loss of jobs caused by the partial or complete termination of an operation at one location and its relocation at another. In such situations, the employees at the old plant are directly affected by the relocation, and *an Employer is required to negotiate* not only respecting the shut-down, but also the *bases and conditions on which employees affected by the termination may transfer to the new location and thus continue to be employed* [Emphasis Supplied]

Clearly, the foregoing precedents require a Respondent in a plant removal case such as the instant one, to bargain concerning the transfer of employees from the old plant to the new one. Certainly this obligation was not fulfilled by merely stating that the Buffalo employees could present themselves in Alexander, along with everyone else, for hire as new employees (particularly after relating that the Buffalo employees were too old, too union oriented, too militant, and, anyway, the Company had an obligation to Genessee County). The language of the Court of Appeals for the First Circuit seems apt in these circumstances:

> It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.[34]

[33] *Fraser & Johnston Company*, 189 NLRB 142, 149. (Emphasis Supplied)

2. While there is no evidence of a written commitment by Respondent to give preference to persons from the Alexander area in hiring, the record reflects that Respondent clearly felt a moral obligation to do so in view of the fact that the people of Genessee County raised the money to build the plant. Thus the situation here is comparable to that in *Fraser & Johnston Company*[35] where the Board (including the dissenting member) noted:

> "The violation here arose out of Respondent's eagerness to do business with the IBEW in its new location and the resulting premature recognition of that Union. Respondent apparently believed that it had a commitment to the IBEW which it was free to implement and, in reliance thereon, denied to the [other Unions] any effective participation in discussions relating to the employment of their constituents in the [new] plant."

Here, because of the moral obligation felt by Respondent, it denied to the Union any "effective participation in discussions relating to the employment of its constituents in the Alexander plant." Also, like *Fraser & Johnston*, the employees here "were experienced and skilled in the necessary work tasks and they could have worked in San Lorenzo — only 25 miles from San Francisco — without

[34] *N.L.R.B.* v. *Reed & Prince Mfg., Co.*, 205 F. 2d 131 (C.A. 1).

[35] 189 NLRB 142.

moving their homes."[36] The record here reflects a similar distance between the old and new plants, and also that most employees drive to work from outlying areas in and around Buffalo, and could have apparently just as easily driven to Alexander. Similarly indicative of the probabilities is the fact that Respondent's supervisory hierarchy transfered substantially intact from the Buffalo plant.[37]

3. The record reflects that during the fall of 1973, Respondent, in marked contrast to its policy respecting the unit employees, freely offered to transfer all of its office employees and supervisors to Alexander. Indeed, Respondent did not refer to the process as a "transfer" but rather as a "continuation of their same job."[38]

The Respondent offered in explanation of the foregoing the suggestion that these jobs were not altered at the new plant whereas the jobs of the unit employees were. However, it has been shown above that the jobs of the unit employees were not so changed that the Buffalo employees could not, with a minimum of training, perform the tasks at the Alexander plant — indeed, some of them were exactly the same, such as operation of the bobcat, forklift operator, etc. Moreover, the record shows that the panel board operator in Buffalo (Pete Sherry) was a very capable employee who received a letter of commendation from the company in 1973 with respect to the work he had been performing. Yet the company preferred to hire an untrained employee in Alexander to perform that job which was described as probably the most sophisticated

[36] Id. at page 143.

[37] See *Cooper Thermometer Company,* 160 NLRB 1902, 1916, at footnote 24.

[38] Of the 13 salaried office employees offered transfers, 7 supervisory employees accepted; of the 8 salaried plant production staff offered transfers, 5 accepted.

position in the plant.[39] Furthermore, Respondent offered to stipulate that in many instances the persons employed in Alexander had less experience in a feed mill than the employees who were already employed at the Buffalo plant and that many of the employees in the Buffalo plant could become qualified for the work that was being performed at Alexander. Finally, counsel for Respondent conceded at the hearing that "we have never contended that the employees in Buffalo could not conceivably perform the jobs over at Alexander."

In the light of all of the foregoing, it seems somewhat inconsistent for Respondent to contend that one of the reasons for failure to transfer the unit employees as distinguished from the nonunit employees and supervisors was because the work tasks was significantly different.[40]

4. Although the decisions to close the Buffalo plant and build the Alexander plant were made by top management, and the record reflects a long history of contractual relations between the company and union, the antiunion remarks made by Respondent's agents at the 1973 meetings between the Respondent and Union, and the 8(a)(1) threats made by the acting superintendent, cannot be overlooked in assessing the Respondent's motivation. That is to say that while the record does not reflect that the move was dictated by union considerations, it also cannot be gainsaid that when viewed in context with other factors such as the moral obligation to Genessee County, the Respondent utilized the move as a device to rid itself of

[39] This, in the face of testimony by Superintendent Stankey that he would "naturally prefer" more experienced employees to those who knew nothing about the commodity with which they were dealing.

[40] Parenthetically, it would seem that the plant supervisors would also have to learn the intricacies of the new machinery as much as the rank-and-file personnel.

the Union which it viewed as an albatross around its production neck. Another significant factor reflecting Respondent's desire not to hire Buffalo employees is the hurdles which it imposed upon them even if they desired to apply for jobs at Alexander as new employees (such as the requirement to go to Alexander to view the premises prior to hire).

C. *The Alleged Discrimination*

The complaint alleges that Respondent, by refusing to transfer the Buffalo employees to Alexander during the latter part of 1973, and by terminating said employees on or about December 28, and thereafter failing to transfer said employees to the Alexander plant, was all because of the employees' union or concerted activities, and was done for the purpose of discouraging membership in the union in violation of Section 8(a)(3) of the Act.

As to this issue, it is my view that, as previously expressed, while the move was dictated primarily because of economic considerations, the Respondent utilized it as a vehicle to rid itself of the Union as the representative of the production and maintenance employees.

It is, of course, well established that if union membership and activity constituted only a portion of the reason for employee termination, a violation of the Act resulted even though other, legitimate reasons existed.[41] Moreover, it would seem that the refusal to allow the Buffalo employees the opportunity to transfer to Alexander under *some* circumstances constitutes conduct which would appropriately fall within the ambit of the "inherently destructive of employee interest" conduct adverted to by the Supreme Court in *N.L.R.B.* v. *Great Dane Trailers, Inc.*[42] That is to say, the Court in *Great Dane*, after finding that a violation of Section 8(a)(3) normally turns on whether discriminatory conduct was motivated by an antiunion purpose, said:

> Some conduct, however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *Labor Board* v. *Brown, supra*, at 287; *American Ship Building Co.* v. *Labor Board*, supra, at 311. That is, some conduct carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent." *Labor Board* v. *Erie Resistor Corp. supra*, at 228, 231. If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails "an unfair labor practice charge is made out." Id., at 228. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.[43]

The Court went on to hold that "If it can reasonably be concluded that the Employer's discriminatory conduct was 'inherently destructive' of *important* employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if an Em-

[41] *N.L.R.B.* v. *Great Eastern Color Lithograhic Corporation*, 309 F. 2d 352 (C.A. 2); *N.L.R.B.* v. *Elias Brothers Restaurants, Inc.*, ____ F. 2d ____ (C.A. 6, May 29, 1974).

[42] 388 U.S. 26 (1967).

[43] Id., at pages 33-34.

ployer introduces evidence that the conduct was motivated by business considerations."[44] (Emphasis Supplied). The Court of Appeals for the Second Circuit in *Cooper Thermometer*, pointed out: "The most important interest of workers is in working."[45] Clearly, the actions of Respondent here in cutting off that important interest constituted conduct which was "inherently destructive" of important employee rights, in violation of Section 8(a)(3). I so find.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) of the Act in particular respects, I shall recommend that Respondent, upon request, bargain collectively with the Union concerning the effects upon the represented employees of the plant relocation from Buffalo to Alexander, particularly with respects to the transfer of such employees. Since the collective bargaining agreement between the Respondent and the Union was in effect at the time the unfair labor practices occurred, it shall be ordered that the Respondent continue to recognize and bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit at the Alexander plant, unless the parties mutually agreed to do otherwise.[46]

[44] Id., at page 34.

[45] 376 F. 2d 684, 688.

I find present in the instant case substantially the same bases which the Board in *Fraser & Johnston* utilized in grounding such an order: (1) Respondent's operation at Alexander is a continuation of the operations of its former plant in Buffalo; (2) The Union has represented the employees at Buffalo since 1938, and the present contract was not due to terminate until June 30, 1974; (3) The relocated plant, while not within the metropolitan area of Buffalo, is within commuting distance for the Buffalo employees; (4) The Alexander plant is neither a merger nor consolidation with previous operations of Respondent; (5) Approximately half of the employees indicated or requested transfer and continued representation by the Union, and were denied such transfers as the result of the Respondent's unfair labor practices.

Having found that in effectuating the move from Buffalo to Alexander in the manner hereinabove set forth, Respondent discriminated with respect to the hire or tenure of employment of the Buffalo employees in the appropriate unit, I shall recommend the normal remedy of reinstatement and backpay to some of these employees. It is neces-

[46] See *Fraser & Johnston Company*, 189 NLRB 142; *Cooper Thermometer Company*, 160 NLRB 1902, 1916, enforcement denied on this point, 376 F. 2d 684-688. The Respondent contends that the collective bargaining agreement should not be applied to Alexander because, *inter alia*, the language in the recognition clause refers to employees employed at the Company's Buffalo plant. However, I have found that the Alexander plant is a continuation of the Buffalo operation, and that words "Buffalo, New York, plant" in that agreement are merely descriptive and not words of geographical limitation. See *The Rittling Corporation*, 203 NLRB No. 59.

sary to tailor the normal remedy in view of: (1) The fact that the employee complement at the Alexander plant is not contemplated to exceed over approximately half of the normal complement of employees at Buffalo; and (2) Only approximately one-half employees at Buffalo indicated a desire to be transferred.[47] Under these circumstances, I shall recommend that Respondent offer the Buffalo employees who indicated a desire to transfer, immediate reinstatement at the Alexander plant to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, displacing other employees, if necessary. The Respondent shall be required to make whole each of the aforementioned employees for backpay from the date of their termination to the date of Respondent's offer of reemployment, less net earnings computed in the manner established by the Board in *F.W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent annum, as set forth in *Isis Plumbing & Heating Company*, 138 NLRB 716.[48]

[47] The record is somewhat ambiguous as to the identity of those employees who, at all times, indicated a desire to transfer. That is to say, some of the employees apparently changed their minds as reflected by the erasing out of their name on the list (see G.C. Exh. # 11). Also, one employee (Joseph Podolic) signed the list twice, but his name was stricken when the union steward copied the list (see list attached to G.C. Exh. #9). These are matters to be determined at the compliance stage of this proceeding. *Fraser & Johnston Company*, 189 NLRB 142, 152 at fn. 56.

[48] Also to be deducted are any emoluments which the employee may have received from the Company such as severance pay, or retirement benefits.

In *Cooper Thermometer Company* v. *N.L.R.B.*, 376 F. 2d 684, the Court of Appeals for the Second Circuit agreed that the Board was "justified in requiring backpay in such cases for workers who would have transferred if proper bargaining had occurred. But the question again is backpay at what rate?" (id., at page 691). In the

(footnote continued on p. 43a)

As for those employees who did not indicate a desire to transfer, but may have been deterred from doing so by the Respondent's illegal conduct, it will be recommended that Respondent place such employees on a preferencial hiring list, to be given an opportunity by Respondent for employment prior to the employment of any other person. Since the record does not identify those employees, I will regard this as a matter to be determined at the compliance stage of this proceeding.[49]

As the Respondent no longer operates the Buffalo plant, I shall recommend that the Respondent be required to post the attached notice to employees at the Alexander plant for the usual period. In addition, since the posting of such notices alone will not be sufficient to reach all of the former employees at the Buffalo plant, I shall recommend that the Respondent be required to mail a copy of the attached notice to each employee who was on the Respondent's payroll as of September 26, 1973 (the date of Respondent's notice to employees of its decision to relocate) at his or her last known address, as disclosed by Respondent records, or as may be amplified by the Union. Further, I shall recommend that the Board reserve to itself the right to amend or modify its order to provide for events which have not been anticipated.[50]

(footnote continued from p. 42a)

particular circumstances of this case, where the prevailing wage rate in Alexander may be expected to be lower than that prevailing in Buffalo, and where, indeed, the Union offered the company a wage rate of 40 cents per hour lower than the Buffalo rate for the transferred employees under the *Agway Plan*, it would seem appropriate that backpay should be computed at that rate rather than the Buffalo rate since the "function of the Board's remedy is to restore the situation, as nearly as possible, to that which would have obtained but for" the illegal action. (Id., at page 691).

[49] *Cooper Thermometer Company*, 160 NLRB 1902, 1917.

[50] See *Fraser & Johnston Company*, 189 NLRB 142, 152-153.

Respondent's unfair labor practices indicate a general attitude of opposition to the purposes of the Act; accordingly, a broad cease-and-desist order is necessary and appropriate to effectuate the policies of the Act.

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of the Respondent at its Buffalo plant, and/or Alexander plant, excepting office and clerical employees, salaried supervisory employees, laboratory employees, foremen, buyers, and salesmen.

4. At all times material, the Union has been the majority representative for purposes of collective bargaining with the Respondent in the aforesaid unit.

5. By refusing since July 5, 1973, to bargain collectively in good faith with the Union as the exclusive representative of the employees in the appropriate unit, concerning the transfer of the employees from the Buffalo plant to the Alexander plant, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By refusing to transfer employees in the appropriate unit from the Buffalo plant to the Alexander plant, and by terminating said employees on or about December

31, 1973, in the manner set forth above, Respondent discriminated with respect to the hire or tenure of employment of said employees, to discourage membership in the Union, in violation of Section 8(a)(3) and (1) of the Act.

7. By the aforegoing conduct, and by threatening employees that Respondent would not transfer employees from the Buffalo plant to Alexander because of their membership in or activities on behalf of the Union, Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[51]

ORDER

Allied Mills, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with American Federation of Grain Millers, Local 110, AFL-CIO, concerning the transfer of employees from the Buffalo, New York, plant, to the Alexander, New York, plant.

(b) Terminating or otherwise discriminating against its employees because of their union membership and activities.

---

[51] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Threatening employees that Respondent would not transfer them to the Alexander plant because of their membership in or activities on behalf of the Union.

(d) In any other manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named union as the exclusive bargaining representative of its employees in the appropriate unit, concerning the effects on the employees of the move from the Buffalo plant to the Alexander plant.

(b) Offer immediate and full reinstatement to their former positions, of those Buffalo plant employees who desired transfer to Alexander, without prejudice to their seniority or other rights and privileges, dismissing, if necessary any persons hired to replace them, and make them whole for any loss of pay, in the manner set forth in "The Remedy" section of this decision. Buffalo plant employees desiring transfer but not able to be reinstated because of the limitations of the Alexander plant, as described above, shall be placed upon a preferential hiring list by Respondent, in the manner set forth in the section of this decision "The Remedy."

(c) Continue to recognize and, upon request, bargain collectively with the above-named union as the exclusive bargaining representative of the employees in the appropriate unit, at the Alexander, New York, plant, pursuant to the collective bargaining agreement between the parties which was in force and effect at the Buffalo plant at the time of the relocation to Alexander, unless the parties mutually agree to do otherwise.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due and the rights of employment under the terms of this order.

(e) Post at its Alexander, New York, plant, copies of the attached notice marked "Appendix,"[52] and forthwith mail to the last known address of each employee on its payroll on and subsequent to September 26, 1973, a copy of such notice. Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent, shall be posted immediately by receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other materials.

(f) Notify the Regional Director for Region 3 in writing, within 20 days from the date of this decision what steps Respondent has taken to comply herewith.

Dated at Washington, D.C.

Robert Cohn
Administrative Law Judge

---

[52] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX JD-540-74

FORM NLRB-4727 (3-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE TELLING OUR EMPLOYEES WHAT WE BEEN ORDERED TO DO AND NOT TO DO IN THE FUTURE.

WE WILL NOT refuse to bargain collectively in good faith with AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 110, AFL-CIO, the exclusive representative, concerning the effects of the move from the Buffalo, New York, plant to the Alexander, New York, plant, on the employees in the bargaining unit described below.

WE WILL NOT terminate or refuse to transfer employees who desire transfer to the Alexander, New York, plant, to discourage membership in or activities on behalf of the above-named union.

WE WILL NOT threaten employees that we will not transfer or accept for employment at the Alexander plant any employees of the Buffalo plant who were members of or affiliated with the above-named union.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed in the National Labor Relations Act, as amended.

WE WILL continue to recognize and, upon request, bargain collectively with the above-named union as the exclusive bargaining representative of the employees in the appropriate unit. The bargaining unit is:

All production and maintenance employees of Allied Mills, Inc., employed at its Buffalo plant and/or Alexander plant, excepting office and clerical employees, salaried supervisory employees, laboratory employees, foremen, buyers, and salesmen.

WE WILL offer (in the manner and to the extent described in the decision of the Board) those employees terminated as a result of our unlawful action immediate and full reinstatement to their former or substantially equivalent positions, at the Alexander, New York, plant, without prejudice to their seniority or other rights and privileges and we will make them whole for any loss of pay suffered as a result of their termination, including interest.

ALLIED MILLS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9th Floor, Federal Building 11 W. Huron Street, Buffalo, New York 14202 (Tel No. 716-842 - 3100_

APPENDIX C

FJK

218 NLRB No. 47

D — 9783

Buffalo and
Alexander, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

Case 3—CA—5516

ALLIED MILLS, INC.

and

AMERICA FEDERATION OF GRAIN
MILLERS, LOCAL 110, AFL—CIO

DECISION AND ORDER

On July 31, 1974, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] and Charging Party and General Counsel filed briefs in answer thereto. Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Allied Mills, Inc., Buffalo and Alexander, New York, it officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. June 6, 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[2]The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX D

NOT TO BE PUBLISHED — SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

September Term, 1975

No. 75-1569

American Federation of Grain Millers, Local 110, AFL-CIO,

Petitioner

v.

National Labor Relations Board,

Respondent

NO. 75-1705

National Labor Relations Board,

Petitioner

v.

Allied Mills, Inc.,

Respondent

American Federation of Grain Millers, Local 110, AFL-CIO

Intervenor

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Before ROBINSON and WILKEY, *Circuit Judges*, and JAMESON,* *Senior United States District Judge* for the District of Montana

*Sitting by designation pursuant to 28 U.S.C. § 294(b) (1970).

ORDER

These causes came on to be heard on the record from the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

September Term, 1975

On consideration of the foregoing, it is ORDERED by this Court that the petition for review is hereby denied, and the Board's cross-application for enforcement of its order is hereby granted.

Per Curiam
For the Court

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1569

AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 110, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 75-1705

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ALLIED MILLS, INC.,

Respondent,

AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 110, AFL-CIO,

Intervenor.

JUDGMENT

Before: ROBINSON and WILKEY, *Circuit Judges*, and JAMESON,* *Senior United States District Judge* for the District of Montana

THIS CAUSE came on to be heard upon a petition filed by American Federation of Grain Millers, Local 110, AFL-CIO, to review an order of the National Labor Relations Board issued against Allied Mills, Inc., Buffalo and Alexander, New York, its officers, agents, successors, and assigns, on June 6, 1975, and upon an application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on June 9, 1976, and has considered the briefs and transcript of record filed in this cause. On October 26, 1976, the Court being fully advised in the premises, issued an Order denying the petition for review and enforcing the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the petition for review filed by American Federation of Grain Millers, Local 110, AFL-CIO, be and it is hereby denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that Allied Mills, Inc., Buffalo and Alexander, New York, its officers, agents, successors,

*Sitting by designation pursuant to 28 U.S.C. § 294(b) (1970).

and assigns, abide by and perform the directions of the Board in said order contained.

Circuit Judge, United States Court
of Appeals for the District of
Columbia Circuit

Circuit Judge, United States Court
of Appeals for the District of
Columbia Circuit

Senior United States District
Judge for the District of Montana

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1569

AMERICAN FEDERATION OF GRAIN
MILLERS, LOCAL 110, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 75-1705

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ALLIED MILLS, INC.,

Respondent,

AMERICAN FEDERATION OF GRAIN
MILLERS, LOCAL 110, AFL-CIO,

Intervenor.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned causes has this day been served by first class mail upon the following counsel at the addresses listed below:

Lipsitz, Green, Fahringer,
Roll, Schuller & James
Att: Richard Lipsitz, Esq.
One Niagara Square
Buffalo, New York 14202

Jacobs, Gore, Burns & Sugarman
Att: Charles Orlove, Esq.
201 North Wells St.
Suite 2122
Chicago, Illinois 60606

Kothe, Nichols and Wolfe, Inc.
Att: Charles A. Kothe and
Lynn Paul Mattson, Esqs.
124 East Fourth St.
Tulsa, Oklahoma 74102

Mozart G. Ratner, Esquire
818 — 18th Street, N. W.
Washington, D. C. 20006

Dated at Washington D. C. this 9th day of November, 1976.

/s/_____
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

GEORGE A. FISHER
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

January 7, 1977

Lynn Paul Mattson, Esquire
Kothe, Nichols & Wolfe, Inc.
124 East Fourth St.
Tulsa, Oklahoma 74103

Re: Appeal No. 75-1705 - National Labor Relations Board v. Allied Mills, Inc.

Dear Mr. Mattson:

In accordance with the request in your letter dated January 3, this will confirm that the petition for rehearing filed by respondent Allied Mills, Inc. was denied by order entered on December 30, 1976. On this latter date, the Court also issued an order denying said respondent's suggestion for rehearing en banc and an order granting its motion for stay of mandate to and including January 30, 1977.

Very truly yours,

George A. Fisher

George A. Fisher
Clerk

GAF/plc

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1705 September Term, 19 76

National Labor Relations Board,
Petitioner

v.

Allied Mills, Inc.,
Respondent

American Federation of Grain Millers,
Local 110, AFL-CIO
Intervenor

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 30 1976

GEORGE A. FISHER
CLERK

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

O R D E R

The suggestion for rehearing en banc filed by respondent Allied Mills, Inc., having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court, en banc, that respondent's aforesaid suggestion for rehearing en banc is denied.

Per Curiam

For the Court:

George A. Fisher

GEORGE A. FISHER
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1705 September Term, 1976

National Labor Relations Board,
Petitioner

v.

Allied Mills, Inc.,
Respondent

American Federation of Grain Millers,
Local 110, AFL-CIO
Intervenor

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 30 1976

GEORGE A. FISHER
CLERK

BEFORE: Robinson and Wilkey, Circuit Judges; Jameson*, U.S. Senior District Judge for the District of Montana

ORDER

On consideration of the petition for rehearing filed by respondent Allied Mills, Inc., it is

ORDERED by the Court that respondent's aforesaid petition is denied.

Per Curiam

For the Court:

George A. Fisher

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX E

STATUTES INVOLVED

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

Sec. 8(a) It shall be an unfair labor practice for an employer —

* * *

. . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members,

or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

8(a) (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice* period specified in this subsection, or who engages in any

*See footnote at bottom of Page 62a.

strike within the appropriate period specified in subsection (g) of this section,* shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d) (1) shall be ninety days; the notice of section 8(d) (3) shall be sixty days; and the contract period of section 8(d) (4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d) (3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.*

*Pursuant to Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 396, the last sentence of Sec. 8(d) is amended by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase ", or who engages in any strike within the appropriate period specified in subsection (g) of this section." In addition, the end of paragraph Sec. 8(d) is amended by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service

of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, or any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or

without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a) (1) or section 8(a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in the case shall have been filed

in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member,

agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the court shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an applica-

tion by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred

or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate

injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b) (7) if a charge against the employer under section 8(a) (2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b) (4) (D).

(m) Whenever it is charged that any person has

engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to where it is referred and cases given priority under subsection (1).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1160

ALLIED MILLS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 110, AFL-CIO,

Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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TABLE OF CONTENTS

PAGE

Authorities Cited ii

Questions Presented 2

Statement of the Case 3

Argument:

I. The Board's Analysis and Decision Is Thoroughly Consistent With Well Established and Governing Principles of Federal Labor Policy .. 7

A. The Refusal to Transfer and Termination of Buffalo Unit Employees Was Clearly Violative of Section 8(a)(3) and (1) of the Act 7

B. The Refusal to Bargain and Failure to Bargain in Good Faith With Respect to the Transfer of Employees Was Clearly Violative of Section 8(a)(5) of the Act. 9

C. The Company's Claims Are Wholly Misconceived and Meritless 10

II. The Board's Remedial Order Is a Proper Exercise of Its Broad Statutory Authority 14

A. Underlying Principles 14

B. The Company's Contentions With Respect to the Remedy Are Without Merit 17

1. The Misconstruction of Section 8(d) . 17

2. The Circuit Courts' Decisions Are Consistent 18

Conclusion 20

Appendix A1

Authorities Cited

Cases

Aero-Motive Manufacturing Co., 195 NLRB 790, enforced 475 F. 2d 27 (6th Cir. 1973) 8

Bigelow v. RKO Radio Pictures, 327 U. S. 251, 66 S. Ct. 574 (1946) 19

Cooper Thermometer Co. v. N. L. R. B., 376 F. 2d 684 (2nd Cir. 1967) 9, 19

Darling & Company, 170 NLRB 1068, enforced 420 F. 2d 63 (7th Cir. 1970) 8

Dura Corporation, 156 NLRB 285, enforced 380 F. 2d 970 (6th Cir. 1967) 8

Fibreboard Paper Products Corp. v. N. L. R. B., 379 U. S. 203, 85 S. Ct. 398 (1964) 9, 14, 16, 18

Franks Bros. Co. v. N. L. R. B., 321 U. S. 702, 64 S. Ct. 817 (1944) 16

Fraser & Johnston Company v. N. L. R. B., 469 F. 2d 1259 (9th Cir. 1972) 9, 19

H. J. Heinz v. N. L. R. B., 311 U. S. 514, 61 S. Ct. 320 (1941) 16, 18

H. K. Porter v. N. L. R. B., 397 U. S. 99, 90 S. Ct. 821 (1970) 17, 18

International Ass'n of M. & A. W. v. Northwest Airlines, Inc., 473 F. 2d 549 (1st Cir. 1972) 9

International Ladies' Garment Workers U. v. N. L. R. B., 463 F. 2d 907 (D. C. Cir. 1972) 10

International Union, United A., A., & A. Imp. Workers v. N. L. R. B. (Pierce Governor Company, Inc.), 394 F. 2d 757 (D. C. Cir. 1968) 12

International U., United A. & A. I. W. v. Scofield, 382 U. S. 205, 86 S. Ct. 373 (1956) 2

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Melville Confections, Inc. v. N. L. R. B., 327 F. 2d 689 (7th Cir. 1964) 8

National Woodwork Manufacturers Association v. N. L. R. B., 386 U. S. 612, 87 S. Ct. 1250 (1967) 9

N. L. R. B. v. C. H. Sprague & Son Co., 428 F 2d 938 (1st Cir. 1970) 10

N. L. R. B. v. Die Supply Corp., 393 F. 2d 462 (1st Cir. 1968) 10, 19

N. L. R. B. v. Erie Resistor Corporation, 373 U. S. 221, 83 S. Ct. 1139 (1963) 8

N. L. R. B. v. Food Store Employees Union, Local 347, 417 U. S. 1, 94 S. Ct. 2074 (1974) 15

N. L. R. B. v. Gissel Packing Co., 395 U. S. 575, 89 S. Ct. 1918 (1969) 16, 17

N. L. R. B. v. Great Dane Trailers, Inc., 388 U. S. 26, 87 S. Ct. 1792 (1967) 8

N. L. R. B. v. Insurance Agents' International Union, 361 U. S. 477, 80 S. Ct. 419 (1960) 12, 13

N. L. R. B. v. Lewis, 246 F. 2d 886 (9th Cir. 1957) 13

N. L. R. B. v. P. Lorillard Co., 314 U. S. 512, 62 S. Ct. 397 (1942) 16

N. L. R. B. v. Reed & Prince Mfg. Co., 205 F. 2d 131 (1st Cir. 1953) 11

N. L. R. B. v. J. H. Rutter Rex Mfg. Co., 396 U. S. 258, 90 S. Ct. 417 (1969) 16

N. L. R. B. v. Truitt Mfg. Co., 351 U. S. 149, 76 S. Ct. 753 (1956) 12, 13

Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 61 S. Ct. 845 (1941) 16, 18

Radio Officers Union of Commercial Telegraphers Union, AFL v. N. L. R. B., 347 U. S. 17, 74 S. Ct. 323 (1954) 8

Weltronic Company v. N. L. R. B., 419 F. 2d 1120 (6th Cir. 1969) 10

Westinghouse Electric Corporation, 174 NLRB 636 9

Statute

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151 *et seq.*) 2

Section 8(a)(1) 2, 7

Section 8(a)(3) 2, 7, 8, 16

Section 8(a)(5) 2, 7, 8, 9

Section 8(d) 17, 18

Section 10(c) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

ALLIED MILLS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 110, AFL-CIO,

Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The American Federation of Grain Millers Local 110, AFL-CIO (herein called "Union") respectfully submits this brief in opposition to the Petition for a writ of certiorari filed by Allied Mills, Inc. (herein called "Company").

The Union filed its own petition in the Court of Appeals to review the subject decision and order of the National Labor Relations Board (herein called "NLRB" or "Board") reported at 218 NLRB 281, and in said petition it sought greater remedies than ordered by the Board. The Union's petition was

consolidated with the Board's petition for enforcement of its order and the Union was given leave to intervene.[1] Thus, the Union, as a party in the proceedings below, has an interest in the subject petition in accordance with Rule 21(4) of the Rules of this Court.

QUESTIONS PRESENTED.

1. Whether substantial evidence supports the Board's findings that the Company refused to bargain in good faith with the Union concerning the transfer of unit employees from its old plant in Buffalo, New York, to its new plant in Alexander, New York, in violation of Section 8(a)(5) and (1) of the Act,[2] in consideration of all the facts and circumstances, including but not limited to:

   (a) the Company's threats that it would not take any unionized employees to Alexander and would never have a union at Alexander, found to be in violation of Section 8(a)(1) of the Act; and

   (b) the Company's refusal to transfer, and its termination of and refusal to reinstate Buffalo employees because of their union membership, found to be in violation of Section 8(a)(3) and (1) of the Act.

2. Whether the Board's remedial order, enforced by the Court of Appeals, was within the Board's wide area of discretion under the Act.

---

1. See the Court of Appeals' order dated September 4, 1975, reproduced as an appendix to this brief (A. 1). There is no question that the Union as a partially successful and partially unsuccessful charging party before the Board had the right to petition for review and/or intervene in the Board's petition for enforcement. *International U., United A., A & A. I. W.* v. *Scofield,* 382 U. S. 205, 86 S. Ct. 373 (1956).

2. National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151 *et seq.*) reproduced in relevant part as Appendix E attached to the Company's petition (A. 59a-71a).

STATEMENT OF THE CASE.

The Company, engaged in the feed industry, operated a plant in Buffalo for many years, and since 1938 the Union has been the collective bargaining representative of the production and maintenance employees. At the time of the events herein, essentially during 1973, the Union and the Company were parties to a collective bargaining agreement covering said employees, which then was scheduled to remain in effect through June 30, 1974 and from year to year thereafter unless either party gave notice of an intent to terminate or modify (A. 13a).

The Company never notified the Union of its plans to construct a facility in Alexander, about 30 miles away, and to close the Buffalo facility; however it did acknowledge those plans when the Union raised to the Company the rumors it had heard to that effect (A. 14a). The parties met on this matter, including the specific issue of the transfer of employees with their work to the nearby new location (A. 14a). It was found as an established fact, ". . . the Company adamantly refused to discuss the transfer of the Buffalo employees to the Alexander plant" (A. 14a and see also: 19a, 20a, 24a n. 18, 25a, 31a, 32a and 33a). Needless to say, by taking this position the parties were precluded from discussing the further question of the bases upon which employees could transfer, *i.e.,* the conditions of employment at the Alexander plant.

The Administrative Law Judge succinctly summarized the comparison of the old and new plants as follows:

> In short, the same raw materials that formerly came to Buffalo now come to Alexander; the same product is made there, and substantially the same customers are serviced from there. Due to the more efficient and sophisticated machinery at Alexander, the production process is performed more efficiently with substantially fewer employees. When asked what the difference was between the production

functions in the two plants, plant manager Williams replied, "Basically it has to do with numbers and multiple jobs." That is to say that, as previously explained, one employee at Alexander, due to the more advanced machinery, can perform more jobs in different places in the plant, and the same is true of maintenance functions. (A. 26a-27a.)

In sum, it was found, "the Alexander plant is neither a merger nor consolidation with previous operations of [the Company]" (A. 41a) but merely a relocation and continuation of production from Buffalo to Alexander (A. 46a).

During the period of time in which the parties met, essentially the latter half of 1973, the following significant events took place:

(a) The Company, ". . . in marked contrast to its policy respecting the unit employees, freely offered to transfer all of its [unrepresented] office employees and supervisors to Alexander. Indeed, [the Company] did not refer to the process as a 'transfer' but rather as a 'continuation of their same job' ". (A. 36a.) Of the 21 persons who were offered the "continuation of their same job," 12 accepted. (A. 36a n. 38.)

(b) The Company supervisor slated to be the superintendent at Alexander, with the authority to hire new applicants, Starkey, told employees:

(i) the Company was not taking any of the employees to Alexander;

(ii) there would never be a union in Alexander; and

(iii) he (Starkey) did not want a union because he did not want "anybody dictating to me". (A. 23a-25a.)

These statements were correctly found to be unlawful under Section 8(a)(1) of the Act. (A. 25a.) Indeed, the Company's principal spokesmen told the Union representatives during their meetings that among their reasons for concluding there would be no transfers was because the Buffalo unit employees were too union oriented and militant. (A. 19a, 21a, 24a n. 18.)

(c) Notwithstanding the Company's "predetermined policy of refusing to transfer to Alexander any of the Buffalo employees represented by the Union" (A. 31a), the Union, around August 10, advised employees it was continuing in its efforts to have Buffalo employees transfer to Alexander and it posted a list for those men to sign who desired work at the new plant (A. 18a). Later, Union representative Rybka presented to the Company a partial list of 18 unit employees desiring transfer, to which the Company replied, "the Union could submit such a list but that it would not do any good." (A. 20a.) At a later time a more complete list of 28 names was sent to the Company however the Company never responded. (A. 21a.) Another copy of the list was again sent later but never favored with a response. (A. 22a.)

Amid the various submissions of these lists indicating the desire of a sustantial number of Buffalo employees to continue their work at nearby Alexander,[3] and the Company's rejection of same, the Company offered its unrepresented employees the continuation of their employment (A. 36a); hired new people with less or no experience in the industry while conceding that Buffalo employees could perform or easily learn to perform the work at Alexander (A. 36a-37a); and indeed Starkey, conceded, "he would 'naturally prefer' more experienced employees to those who knew nothing about the commodity with which they were dealing" (A. 37a n. 39).[4]

3. The 28 Buffalo employees desiring transfer to Alexander would have been sufficient or more than sufficient to entirely staff the Alexander facility (A. 27a n. 20, 42a), but "were denied transfer as the result of the [Company's] unfair labor practices" (A. 41a).

4. For example the former semi-automatic equipment at Buffalo was operated by "a very capable employee who received a letter of commendation from the company in 1973 . . . yet the company

(Footnote continued on next page)

Upon these facts the Administrative Law Judge, affirmed by the Board and enforced by the Court of Appeals, found the Company:

(a) unlawfully threatened employees that they would not be transferred to Alexander because of their membership in and activities on behalf of the Union (A. 22a-25a, 45a);

(b) unlawfully terminated its Buffalo unit employees and refused to transfer them to Alexander because of their membership in and activities on behalf of the Union and to rid itself of the Union (A. 38a-40a, 45a); and

(c) unlawfully refused to bargain and failed to bargain in good faith with the Union concerning the transfer of employees from Buffalo to Alexander in order to rid itself of the Union (A. 29a-38a, 44a).

To remedy these violations the Administrative Law Judge recommended, the Board ordered and the Court of Appeals enforced an order that the Company, *inter alia*:

(a) continue to recognize and upon request bargain with the Union on behalf of its employees in an appropriate unit at the Alexander plant pursuant to the collective bargaining agreement which was in force and effect between the parties at the time of the relocation (A. 46a); and

(b) offer immediate and full reinstatement to those Buffalo unit employees who signed the list and thereby expressed their desire to transfer, paying said employees back pay and placing others desiring transfer on a preferential hiring list. (A. 41a-43a).

(Footnote continued from preceding page.)
preferred to hire an untrained employee in Alexander to perform that job which was described as probably the most sophisticated position in the plant" (A. 36a-37a).

ARGUMENT.

I.

THE BOARD'S ANALYSIS AND DECISION IS THOROUGHLY CONSISTENT WITH WELL ESTABLISHED AND GOVERNING PRINCIPLES OF FEDERAL LABOR POLICY.

The Company's argument displays an astonishing misconception of the facts in this case and governing principles of law. We are dealing here with a long established bargaining unit which was relocated—*not* discontinued or merged, but relocated and continued—to a facility only 30 miles away. Under those circumstances, the Company refused to consider its employees' desire to continue their employment on the same unit work by transfer to the new facility, although it admitted that said employees are at least equally qualified or better qualified by reason of their experience in the unit. Further, the Company negotiators gave as a reason for said refusal the employees' association with and representation by the Union reenforced by threats from supervision to the same effect. Also, the Company discriminatorily offered transfer to only non-represented employees. Under these circumstances the Board very correctly found the Company's conduct to be in violation of Sections 8(a)(1) and (3) and (5) of the Act.

A. The Refusal to Transfer and Termination of Buffalo Unit Employees Was Clearly Violative of Section 8(a)(3) and (1) of the Act.

The record is replete with expressions by the Company that Buffalo employees would not be transferred to Alexander, and thus terminated at the close of the Buffalo facility, because of their membership in an association with the Union (A. 19a, 21a, 23a-25a, 24a n. 18). Moreover there exists the inexplicable

offer to nonrepresented employees of a "continuation of their same job" relocated to Alexander while refusing any similar offer to unit employees.[5]

These findings demonstrate the gross error of the Company's claim that "8(a)(3) violation was found through the tests for bad faith 8(a)(5), not discrimination" (Pet. Brief p. 11). Clearly the Board found a violation of 8(a)(3) upon all the circumstances including the foregoing cited factors which are independent of the Company's refusal to bargain.

From these undisputed circumstances one cannot question that this conduct is discriminatory on its face—the conduct speaks for itself—and an employer's arguments in justification of said conduct "must be unavailing" because of the application of the common law rule that one is held to intend the foreseeable consequences of his act. *Radio Officers' Union of Commercial Telegraphers Union, AFL-CIO* v. *N. L. R. B.*, 347 U. S. 17, 45-46; 74 S. Ct. 323, 338-339 (1954); *N. L. R. B.* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 34, 87 S. Ct. 1792, 1798 (1967); *N. L. R. B.* v. *Erie Resistor Corporation*, 373 U. S. 221, 228; 83 S. Ct. 1139, 1145 (1963); *Melville Confections, Inc.* v. *N. L. R. B.*, 327 F. 2d 689, 691-92 (7th Cir. 1964); *Aero-Motive Manufacturing Co.*, 195 NLRB 790, 791-792, *enf'd* 475 F. 2d 27 (6th Cir. 1973); *Darling & Company*, 170 NLRB 1068, 1072, *enf'd* 420 F. 2d 63, 65-66 (7th Cir. 1970); *The Kroger Co.*, 164 NLRB 362, 374, *enf'd* in relevant part 401 F. 2d 682, 686 (6th Cir. 1968); *Dura Corporation*, 156 NLRB 285, 288-289, *enf'd* 380 F. 2d 970, 972 (6th Cir. 1967).

As the foregoing demonstrates, these are well established uniformly applied principles which do not require review or reconsideration by this Court.

5. The Administrative Law Judge correctly observed this inherent inconsistency since nonrepresented employees or supervisors would be required to reorient themselves to the new plant and its newer equipment exactly in the same way as unit employees (A. 37a n. 40).

B. The Refusal to Bargain and Failure to Bargain in Good Faith with Respect to the Transfer of Employees Was Clearly Violative of Section 8(a)(5) and (1) of the Act.

The Board's conclusion, ". . . an Employer is required to negotiate not only respecting the shut-down, but also the bases and conditions on which employees affected by the termination may transfer to the new location and thus continue to be employed" (A. 34a), is a most correct analysis of law, applying uniform and consistent precedent of this Court and various Circuit Courts.[6]

The statutory obligation to bargain in a situation involving the transfer or relocation of unit work means more than simply discussing whether unit employees wish to transfer to the new location or the terminal benefits for those who do not transfer. The obligation to bargain also requires bargaining in good faith over the terms and conditions of employment at the relocated facility, if it is clear, as it is in this case, that the number of employees who desire to continue their work would constitute a majority of the unit at the new facility and if it is clear, as it is here, that there is no legitimate justification for barring their transfer (such as by reason of an inability to adequately perform or be trained for the jobs at the new facility or that said jobs have been eliminated or substantially altered). This is so because it is well settled that employees have the right to preserve their bargaining unit work. *National Woodwork Manufacturers Association* v. *N. L. R. B.*, 386 U. S. 612, 87 S. Ct. 1250 (1967); *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 85 S. Ct. 398 (1964); *International Ass'n of M. & A. W.* v. *Northeast Airlines, Inc.*, 473 F. 2d 549, 557 (1st Cir. 1972); *Fraser & Johnston Company* v. *N. L. R. B.*, 469 F. 2d 1259

6. The Board cited and relied on: *Cooper Thermometer Company*, 160 NLRB 1902, enforced in pertinent part 376 F. 2d 684 (2nd Cir. 1967); *Fraser & Johnston*, 189 NLRB 142, enforced in pertinent part 469 F. 2d 1259 (9th Cir. 1972); *Westinghouse Electric Corporation*, 174 NLRB 636.

(9th Cir. 1972); *International Ladies' Garment Workers U.* v. *N. L. R. B.*, 463 F. 2d 907, 915-919 (D. C. Cir. 1972); *N. L. R. B.* v. *C. H. Sprague & Son Co.*, 428 F. 2d 938, 941 (1st Cir. 1970); *Weltronic Company* v. *N. L. R. B.*, 419 F. 2d 1120, 1123 (6th Cir. 1969); *N. L. R. B.* v. *Die Supply Corp.*, 393 F. 2d 462 (1st Cir. 1968); *Cooper Thermometer Co.* v. *N. L. R. B.*, 376 F. 2d 684 (2nd Cir. 1967). It is upon this basis that the Board with Court approval has required an employer to recognize a union as the bargaining agent at the relocated facility and apply the terms and conditions of the existing contract, if any, to that facility or bargain in good faith with respect to the wages, hours, terms and conditions of employment of the unit employees at the new facility.

As the law in this area is firmly settled and consistently applied, no basis exists for consideration or review by this Court.

C. The Company's Claims Are Wholly Misconceived and Meritless.

The Company has miscited certain facts in this matter and has thoroughly misconceived the factual and legal bases upon which the Board and lower Court ruled. A review of its claims will so show and further establish that the order issued in this matter raises no new issues and is consistent with well established precedents of this Court.

The Company first argues that by this order an employer is precluded from making the counterproposal that transferring employees continue at the new plant as new hires (Pet. Brief, pp. 16-18). That contention was never at issue in this matter for the following two reasons: (1) the Company here never made any counterproposal, it simply refused to discuss the matter (A. 14a and see: 19a, 20a, 24a n. 18, 25a, 31a, 32a and 33a); and (2) the Company admitted that it made no such counterproposal but only "offered applications" for employment at

Alexander (A. 30a).[7] Thus the Company's factual argument that it would allow "employees to continue at the new plant as new hires" (Pet. Brief, p. 16 is wholly incorrect. It counterproposed nothing and merely said it would allow Buffalo employees the opportunity to apply for employment; the Company never said it would hire employees who applied. Significantly, everybody and anybody can *apply* for employment, the Company was then advertising for applications (A. 21a), therefore the offer of applications was no offer at all since it was then available to the entire community.[8]

Further, the Company's argument in this regard totally ignores the setting in which this erroneously termed "counterproposal" occurred. The Company totally ignores the fact that a reason for rejecting the transfer proposal was its desire to rid itself of "union oriented employees" (A. 19a, 21a, 24a n. 18) in marked contrast to its offer to all nonrepresented employees of "a continuation of their same job" (A. 36a). The Company also has ignored that the *Reed & Prince* rule was only one of several bases on which the Board found a bad faith refusal to bargain. The Board also looked at the untenability of the Company's bargaining claim (A. 35a-36a); the discriminatory and inconsistent refusal to transfer union represented employees while taking a different position on nonrepresented employees (A. 36a-37a); and that the Company's bargaining posture was amid antiunion threats and expressions (A. 37a-38a). Thus, contrary to the Company's contention, the Board properly looked at all the surrounding and relevant facts and circumstances in conclud-

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7. ". . . Labor Relations Director Bard testified as follows . . .:

"Q. I am asking you, did you make any proposals to them, with respect to transferring people?

"A. No we offered applications that the employees could put in for employment at Alexander and no one ever did." (A. 30a.)

8. In this regard the Board's reliance upon the quoted material from *N. L. R. B.* v. v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1st Cir. 1953) is well placed.

ing bad faith exactly as this Court has determined appropriate. *N. L. R. B.* v. *Insurance Agents International Union*, 361 U. S. 477, 508, 80 S. Ct. 419, 437 (1960); *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 155, 76 S. Ct. 753, 757 (1956). Therefore the Company's isolation of one case and its erroneous characterization of the facts must be ignored.

In its second argument the Company contends that the Board precluded the Company from taking the position in bargaining that it wanted to hire only from the Alexander area (Pet. Brief pp. 18-19). Again, the Company has misread the decision because the Board did not so hold. The Board in effect said the Company may not use that reason, *i.e.*, a desire to hire only from Alexander, as a basis to rid itself of union adherents. The underlying bases for this conclusion has been set forth immediately above (See *supra* pp. 11-12) and are equally applicable here except to explicate further that the Company's contention of a good faith desire to hire from Alexander was properly deemed wholly untenable (A. 35a-36a). The closeness of the plants, the antiunion threats and expressions and the discriminatory treatment of unit employees versus others can lead only the conclusion that the Company's expressions of a "moral obligation" to Genessee County was a later contrived ruse to cover its antiunion policy.[9] Therefore, the Board's order does not mean that employers, *in good faith*, may not propose hiring to be limited to the area of the relocated plant,[10]

9. The Administrative Law Judge relied in part on the Company's stipulations and offers to stipulate that Buffalo employees could perform the jobs at Alexander (A. 37a) and the official's statement that he would "naturally prefer" more experienced employees over those who knew nothing about the commodity with which they were dealing (A. 37a n. 39).

10. See for example *International Union, United A., A., & A. Imp. Workrs.* v. *N. L. R. B. (Pierce Governor Company, Inc.)*, 394 F. 2d 757 (D. C. Cir. 1968) where the employer bargained in good faith, was not motivated by an antiunion policy and a legitimate issue existed as to whether employees at the former plant had the physical capabilities of performing duties at the new plant. However, in that case the Court recognized, "a plant relocation does not in itself invalidate a union's representative status . . ." (394 F. 2d at 762).

it does mean, however, and properly so, that employers may not use that reason or any other as a cover for its true motive "to shake the Union". *N. L. R. B.* v. *Lewis*, 246 F. 2d 886, 888 (9th Cir. 1957), enforcing *California Footwear Company*, 114 NLRB 765.

In its third and final argument the Company attacks the manner in which the Board, by drawing inferences, concluded bad faith bargaining (Pet. Brief, p. 20). Of course, all can agree that no order is proper if based upon erroneous inferences, but it is equally clear that the Board must decide this type of case as well as others by drawing appropriate inferences. As stated by Justice Frankfurter in his concurring opinion *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 155, 76 S. Ct. 753, 757 (1956):

> A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.

This Court also held, through Justice Frankfurter in his separate opinion in *N. L. R. B.* v. *Insurance Agents' International Union*, 361 U. S. 477, 508, 80 S. Ct. 419, 437 (1960):

> The Board's function in the enforcement of the duty to bargain does not end when it has properly drawn an inference unfavorable to the respondent from particular conduct. It must weigh that inference as part of the totality of inferences which may appropriately be drawn from the entire conduct of the respondent, particularly its conduct at the bargaining table. *The state of mind with which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case*, and on the sufficiency of the whole record to justify its decision the courts must pass. (Emphasis supplied.)

The foregoing establishes conclusively that the Board's use of drawing inferences was wholly correct, and as shown in greater detail above, " . . . the totality of inferences which may appropriately be drawn from the entire conduct of the [Company]" compels the conclusions reached by the Board.

Therefore, from the foregoing we see there is nothing "new" or "vital" or in "conflict among the circuits." Nor do we see anything other than a uniform application of law upon the methods of analysis mandated by this Court. For these reasons the Company's petition should be denied.

II.

THE BOARD'S REMEDIAL ORDER IS A PROPER EXERCISE OF ITS BROAD STATUTORY AUTHORITY.

A. Underlying Principles.

In *Fibreboard Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 216-217, 85 S. Ct. 398, 405-406 (1964) this Court said:

> [Section 10(c) of the Act] "charges the Board with the task of devising remedies to effectuate the policies of the Act." National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 344, 346, 73 S.Ct. 287, 289, 97 L.Ed. 377. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence * * *." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271. "In fashioning remedies to undo the effects of violations of the Act, the Board must drawn on enlightenment gained from experience." National Labor Relations Board v. Seven-Up Bottling Co., 344, 346, 73 S.Ct. 287, 289. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Elec. & Power Co. v. National Labor Relations Board, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568.

More recently this Court said in *N. L. R. B.* v. *Food Store Employees Union, Local 347*, 417 U. S. 1, 8, 94 S. Ct. 2074, 2079 (1974):

> Congress has invested the Board, not the courts, with broad discretion to order a violator "to take such affirmative action . . . as will effectuate the polices of [the Act]." 29 U.S.C. § 160(c); see e.g. Golden State Bottling Co., Inc. v. N. L. R. B., 414 U.S. 168, 176, 94 S.Ct. 414, 421, 38 L.Ed. 2d 388 (1973).

Applying these principles here we see the Board issued its traditional remedies for the violations found.[11] With respect to the Company's refusal to bargain the Board ordered it to take the following affirmative action:

> Upon request, bargain collectively with the above-named union as the exclusive bargaining representative of its employees in the appropriate unit, concerning the effects on the employees of the move from the Buffalo plant to the Alexander plant.
>
> * * * * *

and

> Continue to recognize and, upon request, bargain collectively with the above-named union as the exclusive bargaining representative of the employees in the appropriate unit, at the Alexander, New York, plant, pursuant to the collective bargaining agreement between the parties which was in force and effect at the Buffalo plant at the time of the relocation to Alexander, unless the parties mutually agree to do otherwise. (A. 46a.)[12]

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11. Indeed, the Union in the Court below unsuccessfully sought a remand to the Board for broader remedies such as: backpay for employees who may not have signed the transfer list because of the Company's threats, and the recovery of litigation costs for misconduct patently and deliberately inimical to the Act.

12. The above quoted order demonstrates the Company's grossly erroneous contention that it has been ordered to pay moving expenses and apply the old contract to the new plant (Pet. Brief p. 10).

(Footnote continued on next page)

There can be no question that an order to bargain upon request is appropriate and well within the Board's statutory powers. In *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 610, 89 S. Ct. 1918, 1938 (1969) this Court said:

> We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See N.L.R.B. v. Katz, 369 U.S. 736, 748, n. 16, 82 S.Ct. 1107, 1114, 8 L. Ed. 2d 230 (1962); N.L.R.B. v. P. Lorillard Co., 314 U.S. 512, 62 S.Ct. 397, 86 L.Ed. 380 (1942).

Moreover, in this case it was found that the Buffalo employees indicating a desire to transfer would have fully staffed the Alexander plant absent their discriminatory termination (A. 42a), thus the bargaining order is manifestly appropriate where, as here, all employees have chosen the Union as their bargaining agent and the Union's continued majority status cannot be questioned. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 64 S. Ct. 817 (1944); *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 62 S. Ct. 397 (1942).

Nor can there be any question, as the Company concedes, "Reinstatement and backpay are traditional remedies for violations of Section 8(a)(3)", citing *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941). See also: *N. L. R. B.* v. *J. H. Rutter Rex Mfg. Co.*, 396 U. S. 258, 263, 90 S. Ct. 417, 420 (1969); *Fibreboard Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 215, 85 S. Ct. 398, 405 (1964).

(Footnote continued from preceding page.)

To the extent that the language "pursuant to to the collective bargaining agreement between the parties which was in force and effect at the Buffalo plant . . ." (A. 46a) may be construed as requiring adherence to that contract, the Company cannot be heard to complain since it is merely being ordered to abide by the terms to which it had agreed. *H. J. Heinz Co.* v. *N. L .R. B.*, 311 U. S. 514, 526, 61 S. Ct. 320, 325 (1941).

Upon the foregoing, there can be no question in this case the Board has issued its common, traditional, Court approved remedy.

B. The Company's Contentions with Respect to the Remedy are Without Merit.

1. The Misconstruction of Section 8(d).

The Company argues that its bargaining goals will be thwarted by the order requiring it to reinstate those Buffalo employees desiring transfer to Alexander. First it must be pointed out that in its brief, but with no citations therefor, it claims its goals were "to place all applicants at the new plant on an equal footing, to avoid transfers with full seniority and benefits, and to hire personnel from the new location" (Pet. Brief, pp. 11-12).[13] The record does not support the Company's contention in brief. Among the Company's stated goals was to avoid hiring the union oriented and militant Buffalo workers (A. 19a, 21a, 24a n. 18); and indeed it never made any offer with respect to transfers (A. 30a-31a). Also, see *supra*, pp. 10-11. Therefore, the Company had no legitimate bargaining goals which will be affected by the remedial order.

Secondly, its reading of Section 8(d) is wholly distorted. That section insures that no party engaged in collective bargaining may be compelled to agree to a proposal or make a concession (29 U. S. C. § 158(d)) and this Court has held that the Board may not require an employer to agree to a proposal even after it had bargained in bad faith, *H. K. Porter Company* v. *N. L. R. B.*, 397 U. S. 99, 90 S. Ct. 821 (1970). In this case the Board has ordered the Company merely to continue to recognize and bargain with the Union; the Company has not been ordered to agree or concede to any Union position.[14]

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13. One cannot ignore the patent inconsistency that a policy to hire from the new location automatically precludes an "equal footing" for all applicants, including those from Buffalo.

14. The correctness of that portion of the order cannot be assailed. *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 610, 89 S. Ct. 1918, 1938 (1969) and the cases cited therein.

The Company has been ordered, however, to reinstate employees to their former employment,[15] and that employment has been continued to Alexander, the facility 30 miles away. To whatever extent reinstatement requires the application of the former terms and conditions or employment cannot be considered in violation of § 8(d) because these are terms and conditions which the Company had voluntarily agreed to in its last collective bargaining agreement with the Union (A. 46a) and, further the Company has agreed and offered to stipulate that Buffalo employees could perform or easily learn the work at Alexander and were "naturally preferred" (A. 36a-37a, 37a, n. 39). The Company's agreement to all such matters would properly require that it execute and abide by a written agreement to that effect, *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 61 S. Ct. 320 (1941), and thus the *H. K. Porter* rule and § 8(d) of the Act are wholly inapposite to this situation. Indeed, any other result would create the anomaly that the Company by committing unfair labor practices could achieve its unlawful purpose and enjoy the fruits of its misconduct. Such result obviously must be avoided.

2. The Circuit Courts' Decisions Are Consistent.

It is the Board's function to restore the situation, as nearly as possible, to that which would have obtained absent the unfair labor practice. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941). This necessarily means that each remedy must be tailored to meet the situation at hand and differences among the Circuit Courts, if any, must be analyzed as being either conceptual or differences based simply on different facts. The so-called "split" among the Circuit

15 There can be no question that reinstatement to remedy discriminatory terminations of terminations resulting from bad faith bargaining is most appropriate. *Phelps Dodge* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941); *Fibreboard Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 215, 85 S Ct. 398, 405 (1964).

Courts asserted by the Company is not a split on a policy basis but merely the result of different factual circumstances.

The Circuit Courts addressing the issue of reinstatement and backpay, as here, have enforced those orders and in some cases left the rate of backpay open to be determined later after bargaining.[16] In none of those cases did there exist, as here, an unexpired agreed upon contract which was precipitously abandoned, yet, in this case, the Board tailored its backpay order by applying a rate, 40 cents per hour less, prevailing at that time in the Alexander area and offered by the Union, in order to restore the situation, as nearly as possible, to that which would have obtained but for the illegal acts (A. 42a-43a, n. 48). Of course the Court can take notice of the extraordinary inflation and corresponding rise in wages since 1973, therefore the backpay will not fully compensate discriminatees for all losses. To whatever extent there are uncertainties, if there are any at all after the reduction of 40 cents, which flow from this situation, said uncertainties should be borne by the wrongdoer whose unlawful deed created the uncertainties. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265 66 S. Ct. 574, 580 (1946).

With respect to Union recognition, all Circuit Courts are agreed that recognition of the Union at the new location is appropriate if upon the particular facts in the case a majority of the employees would have transferred. *Cooper Thermometer Company* v. *N. L. R. B.*, 376 F. 2d 684, 690 (2nd Cir. 1967); *N. L. R. B.* v. *Die Supply Corporation*, 393 F. 2d 462, 468 n. 9 (3rd Cir. 1968); *Fraser & Johnston Company* v. *N. L. R. B.*, 469 F. 2d 1259, 1265 (9th Cir. 1972). Here it cannot be questioned that if the employees had not been discriminatorily terminated, the Alexander plant would have been staffed entirely

16. *Cooper Thermometer Company* v. *N. L. R. B.*, 376 F. 2d 684, 691 (2nd Cir. 1967); *Fraser & Johnston Company* v. *N. L. R. B.*, 469 F. 2d 1259, 1266 (9th Cir. 1972). In *N. L. R. B.* v. *Die Supply Corporation*, 393 F. 2d 462, 468 n. 9 (3rd Cir. 1968), the Court enforced the backpay order without regard to any resulting change in rates.

by Buffalo employees, all of whom were represented by the Union, and there is no indication of any intention by any one of them to be otherwise (A. 42a).

Therefore it is clear that the asserted split among the various Circuits ruling on these situations is based upon the different facts of each case, and, more importantly, said Circuits are uniform in their approval of the types of remedies which are appropriate.

CONCLUSION.

Upon the foregoing it is respectfully submitted that the Company's petition be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 75-1705 September Term, 1974

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

ALLIED MILLS, INC.,
Respondent

ORDER

On consideration of the motion of the American Federation of Grain Millers, Local 110, AFL-CIO ("Union") for leave to intervene herein, it is

ORDERED that the aforesaid motion is granted.

Counsel for the aforesaid intervenor may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court.

For the Court:
HUGH E. KLINE,
Clerk,
By: /s/ DANIEL M. CATHEY,
Daniel M. Cathey,
First Deputy Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1160

ALLIED MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. 51a-52a) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 11a-48a, 49a-50a) are reported at 218 NLRB 281.

JURISDICTION

The order of the court of appeals was issued on October 26, 1976. A timely petition for rehearing and suggestion for rehearing en banc was denied on December 30, 1976. A formal judgment was then entered on February 15, 1977. The petition for a writ of certiorari was filed on February 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner refused to transfer employees to its relocated plant for antiunion reasons, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, and refused to bargain in good faith about the transfers, in violation of Section 8(a)(5) and (1) of the Act.

2. Whether the Board's order properly directs petitioner to offer reinstatement with backpay to the employees to whom it discriminatorily denied transfers and to recognize and, upon request, to bargain with the union as the bargaining representative of the unit employees at the relocated plant, pursuant to the collective bargaining agreement in effect at the time of the relocation, unless the parties mutually agree to do otherwise.

STATEMENT

In 1973 petitioner closed its plant in Buffalo, New York, and opened a new plant in Alexander, New York, approximately 30 miles away (Pet. App. 12a). Petitioner's production and maintenance employees at the Buffalo plant were represented by the American Federation of Grain Millers, Local 110, AFL-CIO ("the Union"), and were covered by a collective bargaining agreement that was not due to expire until June 30, 1974 (Pet. App. 12a). Although petitioner offered to transfer all its non-union office employees and supervisors to the new plant (Pet. App. 36a), it refused to transfer any of the union-represented employees (Pet. App. 14a-15a). Instead, petitioner staffed the production and maintenance operations at the Alexander plant entirely with newly hired employees (Pet. App. 15a).

After a six-day hearing, the administrative law judge found that petitioner had refused to transfer unit employees from Buffalo to Alexander for antiunion reasons, in violation of Sections 8(a)(3) and (1) of the National Labor

Relations Act, 29 U.S.C. 158(a)(3) and (1) (Pet. App. 37a-40a); had refused to bargain in good faith about the transfer of the unit employees, in violation of Sections 8(a)(5) and (1) of the Act (Pet. App. 29a-38a); and had threatened unit employees that it would not transfer any of them to Alexander and would not have a union there, in violation of Section 8(a)(1) of the Act (Pet. App. 23a-25a). The Board affirmed those findings and conclusions, and adopted the recommended order.

The order directs petitioner to cease and desist from the unfair labor practices found and from interfering, in any other manner, with the exercise of employee rights under Section 7 of the Act (Pet. App. 45a-46a). In addition, the order directs petitioner (1) to offer reinstatement with backpay to employees who indicated a desire to transfer to the new plant by signing a posted transfer list and to dismiss, if necessary, employees hired to replace them; (2) to put on a preferential hiring list employees deterred from indicating a desire to transfer by petitioner's unfair labor practices; (3) unless the parties otherwise mutually agree, to recognize and, upon request, to bargain in good faith with the Union as the exclusive bargaining representative of the unit employees at Alexander, pursuant to the collective bargaining agreement that was in force and effect at the time of the relocation to Alexander; and (4) to post and mail appropriate notices to the Buffalo employees (Pet. App. 40a-44a, 45a-50a).

The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 51a-54a).

ARGUMENT

Contending that the Board's findings of fact are not supported by substantial evidence (Pet. App. 7, n. 11), petitioner in this case makes several arguments largely dependent upon its own version of the facts. None merits further review.

1. Contrary to petitioner's contentions (Pet. 6 n. 10, 7 n. 11, 10-13, 15-20), the Board's findings of discriminatory motivation and bad faith do not rest on inferences derived solely from petitioner's bargaining proposals. The findings rather rest upon specifically credited testimony regarding statements by petitioner's representatives that unit employees would not be transferred to the new plant because they were "too union-oriented, and militant," that none of the union-represented employees would be transferred, and that there would not be a union at the Alexander plant (Pet. App. 19a, 21a, 23a-24a, 31a n. 27). In light of these statements, there was ample support for the Board's findings that petitioner "utilized the move [from Buffalo to Alexander] to rid itself of the Union as the collective-bargaining representative of the employees in the bargaining unit" (Pet. App. 29a-30a)[1] and that it failed to bargain in good faith about the terms on which unit employees might transfer, having adopted a "predetermined policy of refusing to transfer to Alexander any of the Buffalo employees represented by the Union" (Pet. App. 31a).[2]

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[1]The Board expressly found that petitioner's refusal to transfer and termination of the unit employees occurred "because of the employees' union or concerted activities, and was done for the purpose of discouraging membership in the union in violation of Section 8(a)(3) of the Act" (Pet. App. 38a). Alternatively, it held that petitioner's refusal to transfer the union-represented employees, while offering transfers to nonunion employees and supervisors, was conduct "so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive" (Pet. App. 39a, citing *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34).

[2]The Board found, contrary to petitioner's contention (Pet. 5, n. 6), that "this is not a case where the Union was insisting upon a transfer of all employees or, indeed, upon any specific precondition of transfers" (Pet. App. 31a).

2. Petitioner contends (Pet. 8-15) that the Board's order requiring reinstatement of certain employees and award of backpay exceeds its authority under Section 8(d) of the Act.[3] Although it is well-established, as petitioner concedes (Pet. 10), that reinstatement and backpay are appropriate remedies for unlawful employment discrimination and the unilateral alteration of working conditions following a refusal to bargain (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 187-189; *National Labor Relations Board* v. *J. H. Rutter Rex Mfg. Co.*, 396 U.S. 258, 262-263; *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 215-217), petitioner nevertheless suggests (Pet. 5 n. 7, 7, 10-14) that the traditional remedy is inappropriate here because the jobs at the new plant allegedly are not comparable to those at the old plant and the parties allegedly have not agreed on the terms and conditions under which the Buffalo employees may transfer to Alexander. The Board concluded, however, on substantially undisputed evidence, that petitioner's "operation at Alexander is a continuation of its former plant in Buffalo" (Pet. App. 41a, 25a-27a), that the Buffalo employees could perform the unit jobs at Alexander with little or no training (Pet. App. 36a-37a), and that the terms and conditions of employment applicable at Alexander are those previously in force at Buffalo under the collective bargaining agreement, unless the parties mutually agree otherwise (Pet. App. 40a-41a n. 46).[4] Under those circumstances the Board's order was well within the scope of its legitimate authority.

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[3]The Board's order directs petitioner to offer the Buffalo employees who indicated a desire to transfer reinstatement "to their former or substantially equivalent positions at [Alexander]" and to make them whole for any backpay lost (Pet. App. 42a).

[4]Backpay is to be computed at a rate that is 40 cents an hour less than the Buffalo rate to reflect the lower wage rates prevailing in Alexander. The Union conceded that the lower rate would be appropriate (Pet. 42a-43a n. 48).

Nor does the order improperly impose an agreement upon petitioner against its will (Pet. 9-12). Cf. *H.K. Porter* v. *National Labor Relations Board*, 397 U.S. 99. The order simply holds petitioner to the contract terms to which it had agreed and from which it unlawfully sought to escape. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357.[5] The order further restores the employment conditions that petitioner unilaterally altered and, thus, establishes a proper predicate for future good faith bargaining. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, *supra*, 379 U.S. at 216.

3. Petitioner also contends (Pet. 15-20) that the Board's decision limits an employer's right to formulate legitimate bargaining proposals concerning transfer of employees in the event of plant relocation (Pet. 15-20). That construction of the Board's decision is incorrect. The decision merely holds that an employer fails to bargain in good faith when he refuses to discuss transfers with the union because he has determined for discriminatory reasons not to transfer union-represented employees.[6]

Although the Board considered much of the same evidence in making its findings of discrimination in employment, in violation of Section 8(a)(3) and (1), and of bad faith bargaining, in violation of Section 8(a)(5) and (1), that fact alone does not constitute an "improper use of inference upon inference to find bad faith" (Pet. 20). Compare *United*

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[5]The contract may be terminated or modified, upon proper notice, 60 to 90 days prior to its June 30 anniversary date; otherwise, it is automatically renewed from year to year. See *National Labor Relations Board* v. *Beverage-Air Co.*, 402 F. 2d 411, 417 (C.A. 4).

[6]Thus, no conflict is presented with cases cited in the petition (pp. 17-19) holding that the Act does not require the making of a concession or authorize the Board to sit in judgment upon the substantive terms of collective bargaining agreements.

States v. *Ross*, 92 U.S. 281. As noted above (p. 4), the Board's findings of discriminatory motivation and bad faith do not rest exclusively upon inferences drawn from petitioner's bargaining conduct. In any event, when an employer discriminates in employment by denying transfers to employees because they are represented by the union, he also bargains in bad faith by refusing to discuss any terms upon which union-represented employees may transfer. The Board cannot be barred from finding a violation of Section 8(a)(3) of the Act merely because a part of the evidence supporting that finding also shows a violation of Section 8(a)(5).

4. Finally, the Board's order to recognize and bargain with the Union does not impose a bargaining representative on employees who never selected it. Cf. *Local 57, International Ladies' Garment Workers' Union (The Garwin Corp.)* v. *National Labor Relations Board*, 374 F. 2d 295, 300 (C.A. D.C.), certiorari denied, 387 U.S. 942 (Pet. 15 n. 15). The Board's order of reinstatement contemplates that numerous Buffalo employees will be transferred to Alexander and will constitute all or a substantial majority of the unit complement there. Accordingly, "continuity in the identity of the work force may be presumed to follow and an order to recognize and bargain with the union as representative of the present work force is appropriate." *K.B. & J. Young's Super Markets, Inc.* v. *National Labor Relations Board*, 377 F. 2d 463, 465 (C.A. 9), certiorari denied, 389 U.S. 841. See also *Lewis d/b/a California Footwear Co.*, 114 NLRB 765, 769-770, enforced, 246 F. 2d 886, (C.A. 9).[7]

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[7]The Board found, on substantial evidence, that enough Buffalo employees had indicated a desire to transfer to Alexander by signing the transfer list to staff the new plant (Pet. App. 42a, 18a, 21a), and that the 30-mile distance between Buffalo and Alexander did not make transfers impracticable (Pet. App. 35a-36a). Cases cited by petitioner (pp. 13-15 and n. 15) are distinguishable. In *Cooper Thermometer Co.* v. *National Labor Relations Board*, 376 F. 2d 684, 690 (C.A. 2), and *Fraser & Johnston Co.* v. *National Labor Relations Board*, 469 F. 2d 1259, 1265

CONCLUSION

The petition for certiorari should, therefore, be denied.

Respectfully submitted.

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MAY 1977.

(C.A. 9), it was found that the record evidence did not warrant an inference that a majority of the employees would have transferred to the relocated plants, absent the employer's unfair labor practices. In *National Labor Relations Board* v. *Die Supply Corp.*, 393 F. 2d 462 (C.A. 1), the court enforced the Board's order in full, including provisions requiring recognition and bargaining and reinstatement with backpay (393 F. 2d at 468, n. 9), but concluded that the collective bargaining agreement expired by its express terms when the employer "terminate[d] its operations" at the old plant (393 F. 2d at 465). In *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143, 149 (C.A. 6), certiorari denied, 371 U.S. 941, the court held, in a Section 301 suit, that the terms of the collective bargaining agreement limited its application to the company's plants "within the city limits of Detroit," Michigan, and did not provide benefits for employees in a plant relocated in Lebanon, Tennessee. The Board found here that the contract lacked words of geographical limitation and that it was not intended to terminate upon relocation of the plant 30 miles away. (Pet. App. 41a n. 46).